

HISTORY  
OF  
ROMAN PRIVATE LAW

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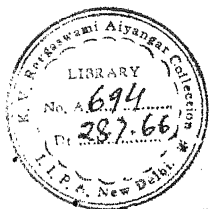
# HISTORY OF ROMAN PRIVATE LAW

## PART I SOURCES

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# HISTORY OF ROMAN PRIVATE LAW.

## INTRODUCTION.

WHETHER I shall be doing what is worth while—to quote the opening words of *Livy*—in writing a new History of Roman Law at this time of day, I scarcely know. The following were the *desiderata*, as they seemed to me, which determined me to the task a good many years ago (see Clark's *Practical Jurisprudence*, p. 6).

The ultimate results of the so-called "Classical Jurisprudence," coupled with the Imperial Legislation which ends with Justinian, had been duly estimated and fairly well expounded, in one form or another, for some time past. But the treatment of Roman Private Law in its process of historical development, which surely is at least as remarkable and instructive as those results, did not appear to me to have been distinctly dealt with in an equally satisfactory manner.

This deficiency was not of course imputed by me to any failure in insight or power of treatment on the part of predecessors and contemporaries whom it would have been presumption to criticise, but to differences in object. I can best explain my meaning by reference to one of the most renowned of such predecessors. In the Introduction to his *Spirit of the Roman Law*, *Ihering* speaks of the inner relation and mutual belonging (*Zusammengehörigkeit*) of

facts, as more important for his purpose, than their outer connexion (*Verbindung*) through time (*Geist*, i. 59, 60 and *Anm.* 27). If this dictum merely indicates the selection or greater prominence of certain facts as compared with other contemporary facts, there can be no question of its truth and applicability for all historical purposes. In Ihering's actual treatment of his subject I think it means a good deal more. That subject is a generalisation—avowedly, it is true, “at different stages of development”—but still a generalisation of the Spirit of Roman Law, or of the Roman people in their law-making capacity, *as a whole*. It is a subject most interesting and suggestive for philosophical or ethnological study: in the course, moreover, of its treatment, it involves propositions and conclusions, on this or that individual question of Roman legal history, for which the gratitude of all modern writers on Roman Law is due to its author in no ordinary degree. On the other hand, such a treatment does frequently and unavoidably coordinate views and principles separated by lapses of time inconsistent with any traceable sequence. Yet this sequence, or in other words this relation of cause and effect, is of the essence of the enquiry—so at least it seems to me—where Roman Law is studied, either simply as a matter of History or, in connexion with Jurisprudence, as an example and a lesson of experience for practical politics and actual life. And this last is the point of view from which I am endeavouring to trace the development of that part of Roman Law which has more particularly survived to modern thoughts and times.

In the course of this enquiry I have found myself unavoidably obliged to go sometimes beyond the strict province of Private Law, at least in the opening stages—to enter, in fact, into the early Constitutional History of Rome and the authorities for that history—a much debated subject,

to be avoided as far as possible by all cautious and peaceable persons.

The general difficulty, in very early times, of disentangling Private from Public Law is well known, and will be more specifically referred to hereafter. There is also, in the case of Rome, a particular connexion between the original constituents of the Roman Polity and some fundamental principles of the subsisting Private Law: so that an enquiry into the former is no mere antiquarianism but an essential part in the study of the latter.

Outside, however, of such naturally debateable ground as that of the Family and the Gens, I have not been able to avoid some notice of what is more strictly and properly known as Constitutional Law, with the difficulties of which, in the case of Rome, I am only too familiar, and which has little direct bearing on Private Law. May I plead in excuse an habitual attempt, or at least desire, to look throughout at the study of Roman Law in the "practical" or "exemplary" light of which I have spoken above—that is, in connexion with Jurisprudence? In this point of view the attention of the student cannot but be attracted to phenomena illustrating the manner in which Law, of any kind, comes into existence in older States. And, should that remote question be ruled out as "academic," the Roman legislative or quasi-legislative bodies, at any rate of later times, furnish well recognised examples of the Modes and Forms in which Law has been historically made.

It is, in fact, matter of common experience that, in treating of Jurisprudence as an independent subject, one generally finds one's self assuming or discussing, by way of illustration, certain very debateable parts of Roman History, the difficulties of which seem almost to be increased—perhaps rather disclosed—by recent research.

And however, Jurisprudence apart, we endeavour to

confine ourselves to what comes properly under Roman Private Law, it is scarcely possible to ignore the distinctions and definitions which come at the beginning of the Roman Institutes themselves.

These are my reasons for venturing, at what I believe to be the proper chronological points, on such statements of Roman legislative development as appear to be best proved, or at least most probable: as also for prefixing, to the main part of the work, a short chapter on Jurisprudence in connexion with Roman Law—detail being in both cases, as far as possible, avoided.

It only remains for me to account, more particularly, for the appearance of this book by the side of others, dealing with much the same subject, which have been given to the world since my own original design was taken in hand.

In *Karlowa's Rechtsgeschichte*, full of valuable matter as it is, I myself have continually had to contend with the difficulty of distinguishing between the early and the late, in spite of his broad division into *jus civile* and *jus honorarium*. This work is moreover unfinished, and suffers, like so many of the continental works on Law, from the want of an alphabetical Index, for which Tables of Contents (*Inhalte*), however full, are no sufficient substitute. The same remark applies to the so-called *Indici* of Professor Pais' *Storia*, a work on which I shall have to speak in another section (§ 2, p. 29).

In *Cuq's Institutions Juridiques* the idea of evolution or development set forth in the Preface is very well carried out by the following two volumes, of which the second one (1902) is unfortunately *not* indexed, like its predecessor. The facts, that Professor Cuq includes much more detail than is proposed by the present work, and that I have the misfortune to differ from his conclusions on some material

points, are among the reasons why I have not thrown aside my own earlier and slighter design.

The object, on the other hand, of **Girard's** *Manuel*—the one of all foreign works from which I have derived most assistance in Roman Law—is quite different from mine. Except as to the brief *Introduction historique*, this work (in the 2nd edition admirably indexed) is an excellent account of Roman Private Law, not in order of time throughout, but classed under the Institutional heads, Persons, Property and Civil Actions.

Coming to English works, I feel that I cannot add much to the excellent and interesting Introduction of the late Professor **Muirhead**, and to Mr **Greenidge's** "Legal Procedure of Cicero's Time," which contains an amount of valuable historical matter far beyond what its title promises. In the former work, it is true, there seemed originally to be, in some degree, the fault which I have been hardy enough to find in **Ihering**, of not laying sufficient emphasis upon the order of time. Perhaps it would be more correct to say that, in my own opinion, fairly established dating could have been followed rather more than it was, in **Muirhead's** book; which however, it should not be forgotten, purported to be rather a historical introduction than a history. I should also add that the work has been very fully supplemented, in this and other directions, by Professor **Goudy's** edition. The majority of Mr **Greenidge's** conclusions are so very near those at which I had arrived myself that a repetition might seem unnecessary. Still there are points on which I am obliged to differ both from him and **Muirhead**, as I am, in a greater degree, from **Cuq**: and, apart from such differences, there does appear to me to be still room for a more systematic dealing with Roman Private Law as a matter of historical development.

In treating, then, of a development, we must *ex proposito*

make the actual order of succession a primary and essential part of our enquiry. Nor, indeed, is this only true of the larger changes with which the following work will be mainly concerned. Even in monographs, on definite and limited topics from the Institutes or Digest, I have repeatedly found a careful observance of the order of time, as shewn by the authors quoted, indispensable for a clear understanding of the subject and an explanation of apparent contradictions.

But, it may be asked, is such order, in the general-subject of Private Law at Rome, attainable by us moderns?

On the whole I think it is; however much the exact year of many important turning-points in Roman legal history may remain a matter of question. A certain relative order, or succession of events, may generally, at least in later times, be predicated with some degree of confidence; and an approximation to an absolute date has been agreed upon, for many of the events referred to, by a majority of modern authorities. Where, therefore, such dates have been assigned, I propose to give the one that appears to me best supported, with the evidence, which alone is of any permanent value, of the ancient writers themselves. In these last words I need scarcely say that no disrespect is intended to recent juristic or historical works: but I wish to protest against a habit, occasionally somewhat prevalent, of regarding modern conclusions as almost equivalent to original authority. On the same principle, with regard to the interpretation of doubtful points in Roman Custom or Law, I have refrained from giving references to recent writers where it seemed that a conclusion might be fairly drawn from Roman sources.

In the earlier and less historical portions of my subject, use will occasionally be made of philological derivations, and, more rarely, of comparative Ethnology. The former



are, by this time, except in one or two cases, determined with scientific exactness. For their value, as evidence, I can only repeat what I have written elsewhere (*Practical Jurisprudence*, pp. 13, 14). The original meaning of a name, thus determined, must obviously preserve to us that property which the man, who used it, considered most important or striking in the *thing*. But this meaning should always be checked and corroborated by early *usage*; in order, on the one hand, to confirm the conclusions of science, on the other, to take into account the modifications due to time and environment. The last-named element indicates a ground for the still greater caution which must, in my view, be used, when we employ the illustrations—for they are little more—of comparative Ethnology. On this, however, I shall have to speak more fully in the short space which I must devote to the Constituent Elements of the Roman State.

I have found it desirable, before the main part of the following book, to draw up an introductory statement of the sources of our knowledge, appended to which is a brief chronological table of the principal events bearing on my subject—the latter forming practically a Table of Contents. Many of the facts themselves, and more of the dates assigned to them, are, I must admit, in the earlier centuries, matter of great question. Such questionableness is, however, indicated throughout by *italic* type.

A list is here added, of those books which are so frequently quoted as to require an abbreviated reference, and of those in which the reference might be missed owing to difference of edition: where none is mentioned the first or only issue is the one referred to. In quotations from Greek and Latin texts, a recent Teubner edition has generally been used.

BOOKS QUOTED BY ABBREVIATED TITLE OR IN SOME EDITION OTHER THAN THE FIRST.

A. G. Aulus Gellius, *Noctes Atticae*.

Brugmann. B. und Delbrück, *Vergleich. Gram. der Indogerm. Sprachen*.

Bruns. *Fontes Juris Romani Antiqui*, ed. 6.

Burn. *Rome and the Campagna*.

C. I. L. *Corpus Inscriptionum Latinarum*.

Clark, E. R. L. *Early Roman Law*. Regal period.

Clark, P. J. *Practical Jurisprudence*. A Comment on Austin.

Clinton, F. H. *Fasti Hellenici*.

Clinton, F. R. *Fasti Romani*.

Cod. *Codex Justiniani* (ed. Krüger).

Cod. Greg. Herm. Th. *Codex Gregorianus, Hermogenianus, Theodosianus*.

Coll. Aj. *Collectio librorum juris antejustiniani* (Krüger, Mommsen, Studemund).

Corssen, Aus. *Aussprache &c. der Lateinischen Sprache*, ed. 2.

Corssen, Beit. Nacht. *Kritische Beiträge o. Nachträge zur Lateinischen Formenlehre*, 2nd ed.

Costa. *Diritto privato Romano nelle Comedie di Plauto*, ed. 2.

Cuq i, ii. *Les Institutions juridiques des Romains*.  
i. *L'Ancien Droit*. ii. *Le Droit classique et le Droit du Bas-Empire*.

Curtius. *Grundzüge der Griechischen Etymologie*, 5th ed.

D. H. *Dionysi Halicarnasensis Antiquitates Romanae* (ed. Jacoby).

Dig. *Digesta Justiniani* (ed. Mommsen).

Festus, F. *Festi schedae ap. Laetum et fragmenta e Cod. Farn.*; Festus, P. *Pauli Diaconi excerpta*: (ed. Müller).

Ga. Gai Institutiones. Text generally as in Coll. Aj. i.: Mu. Muirhead's ed.: Poste, ed. 4: A. and W., Abdy and Walker, ed. 3.

Girard. Manuel de Droit Romain, ed. 2.

Greenidge. The legal procedure of Cicero's time.

Ihering. Geist des Römischen Rechts, ed. 4.

Just. Justiniani Institutiones. Moyle, ed. 4: A. and W., Abdy and Walker.

Karlowa. Römische Rechtsgeschichte.

Karlowa, C. P. Römische Civilprozess zur Zeit der Legislationen.

Krüger. Histoire des sources du Droit Romain (Brissaud's translation).

Lenel, Ed. Das Edictum perpetuum.

Lenel, Pal. Palingenesia Juris Civilis.

Lewis, Sir G. C. Credibility of the Early Roman History.

Maine, A. L. Ancient Law, 5th ed.

Maine, E. H. Early History of Institutions.

Maine, E. L. Early Law and Custom.

Maine, V. C. Village Communities, 3rd ed.

Middleton. The Remains of Ancient Rome.

Mommsen, H. History of Rome. Dickson's translation.

Mommsen, Chron. Die Römische Chronologie, 2nd ed.

Mommsen, Forsch. Römische Forschungen, 2nd ed. of 1st Vol.

Mommsen, Sr. Römisches Staatsrecht, 3rd ed. of Vols. 1 and 2.

Mommsen, Str. Römisches Strafrecht.

Muirhead. Historical Introduction to the Private Law of Rome, 2nd ed.

Pais. Storia di Roma.

Pliny, N. H. C. Plini Secundi Naturalis Historia.

Pliny, Epp. C. Plini Caecili Secundi Epistulae.

Roby, Int. Introduction to Justinian's Digest.

Roby, R. P. L. Roman Private Law.

Savigny, Syst. System des heutigen Römischen Rechts.

Savigny, *Gesch. Geschichte des Römischen Rechts im Mittelalter*.

Schöll. *Legis duodecim tabularum reliquiae*.

Teuffel. *History of Roman Literature*, translated from 5th German ed. by Warr.

Varro, L. L. M. Terenti Varronis *de lingua Latina* (ed. Müller).

Varro, R. R. M. Terenti Varronis *Res rusticae* (ed. Keil).

## PART I.

### SOURCES AND CHRONOLOGICAL SKETCH.

PRIMARY SOURCES, real or reputed, p. 11. Numa's books, 12. *Jus Papirianum*, 13. The *Cippus* of the forum, 14. The Gallic Conflagration, 14. The *Jus Papirianum* of Pomponius, 16. *Jus* or *Lex*, 17. *Regiæ leges*, 19. Early Republican *leges*, 19. The Twelve Tables, 20. Later original documents, 24. *Leges, Negotia*, 25. The Edict, *Constitutiones*, and Digest, 26.

§ 1. **Primary Sources.** By Sources are here understood sources of our knowledge, as distinguished from sources legislative or judicial, i.e. the authorities from whom Law emanates. The word is used in the same sense by Krüger, in his excellent work on the subject, or rather by M. Brissaud in the French translation of Krüger, which is the version hereafter quoted. To that work I would refer the reader for all detailed information. My present object is only to indicate generally the various classes of authority upon which we have to rely for information, and their respective values.

By *primary* Sources I mean original documents or full copies. Of these, as regards Roman Law, we moderns possess (with the exception of a recent and much debated antiquarian find) practically nothing before the *Senatus consultum de Bacanalibus* of 186 B.C. Before, however, we come to that date, we must needs take some account of such earlier docu-

ments of this class as were known, or reputed to be known, to our classical authorities.

**Numa's Books.** Pliny quotes from Cassius Hemina (*fl.* c. 150 B.C.) a strange story of certain books of Numa being discovered, together with the coffin of the same king, in the year B.C. 181; which books were burnt by the then Praetor of the City, "on account of their philosophical subject-matter<sup>1</sup>." This naive reason may be compared with the expulsion from Rome of the *philosophi* and *rhetores* twenty years later, 161 B.C.<sup>2</sup> Other early annalists referred to by Pliny make the books consist half of pontifical law, half of philosophy; one speaks of them as containing Numa's judgements (*decreta*). Livy, who adds some of his graphic touches to the account, makes the ground for the destruction of these books to be their tendency to unsettle religion—a strange ground when the alleged author was Numa. Modern criticism might rather suggest the natural treatment of a peculiarly impudent forgery<sup>3</sup>. It would not appear that either Hemina himself (who refers more than once<sup>4</sup> to institutions or constitutions of Numa), or any of the other authorities, who vary materially both as to the number and contents of these books, had even seen them, before their memorial, whatever its worth, was blotted out by the conservative Praetor. It is quite unnecessary to discuss the question whether their alleged material (*charta*)—the preservation of which is ingeniously accounted for—could have existed (at least in the West) before the campaigns of Alexander<sup>5</sup>. The real sources of information as to Regal Law were the Pontifical records, which are, there is little doubt, the *monumenta* wherein Cicero tells us the laws of

<sup>1</sup> N. H. 13. 13. 84—87. See too Livy 40. 29.

<sup>2</sup> Suetonius, *de viris illustribus*, c. 1. Also A. G. 15. 11. 1.

<sup>3</sup> See Pais, i. 387.

<sup>4</sup> Pliny, N. H. 18. 2. 7: 32. 2. 20.

<sup>5</sup> See Varro, *cit.* by Pliny, N. H. 13. 11. 69.

Numa were still, in his own time, extant<sup>6</sup>. The only value of the above story is the inference which we may draw from one of its authorities that the *jus pontificium* consisted, to some extent, of *reported cases* (see below, § 2, p. 31).

**Jus Papirianum.** Besides this story we have the following pedigree of a collection of the so-called *leges regiae* which was extant under Hadrian. The compilations<sup>7</sup> of Numa on sacred matters were, according to Dionysius, procured, by the fourth king Ancus, from the Pontiffs, and set forth in the forum for public perusal, inscribed on oaken tablets. These perished (or disappeared) by lapse of time. But after the expulsion of the kings, they (the above-named compilations or ordinances) were again publicly posted up<sup>8</sup> by the chief pontiff C. Papirius, of whom we have a curious doublet, M'. Papirius, made on the same occasion *rex sacrorum*<sup>9</sup>. According to another account by the same author, certain laws introduced by Romulus and Numa, which had come into disuse, were re-edited by Servius Tullius, with additions of his own, and inscribed on tablets, which were removed from the market-place and destroyed by the last of the kings<sup>10</sup>. Part, apparently certain so-called laws on Contract, were re-enacted or re-called into use<sup>11</sup> at the beginning of the Republic, but we do not hear in this case of any fresh posting up.

These alleged publications whether by a king or by an early republican Papirius, have not received much quarter from modern criticism. Schöll<sup>12</sup> dismisses the whole idea of written laws under the kings, and in particular the collection

<sup>6</sup> Cic. de Rep. 2. 14. 26: 5. 2. 3.

<sup>7</sup> D. H. 3. 36, συγγραφάς, ὡς Πομπήλιος συνεστήσατο. Below they are διαγραφαί.

<sup>8</sup> Ib. εἰς ἀναγραφὴν δημοσίαν αὐθις ἤχθησαν.

<sup>9</sup> D. H. 5. 1, πρῶτος ἱερῶν. In 3. 36 too the ms. reading is ἱερῶν, altered by Sylburg to ἱερέων.

<sup>10</sup> D. H. 4. 10, 43.

<sup>11</sup> D. H. 5. 2, τοὺς νόμους τοὺς περὶ τῶν συμβολαίων... ἀνεκώσαντο.

<sup>12</sup> Schöll, p. 51.

of *Sextus* Papirius (another *alias*, of which we shall read presently) with a contemptuous "*Si Dis placet*." An "exoteric" character of certain reported fragments is, it is true, recognised both by Mommsen and Karlowa<sup>13</sup>; but neither, as I understand, gives any credit to the stories of publication. I need not cite Pais, whose wholesale scepticism extends to far later and better authenticated memorials than these.

**The Cippus of the Forum.** Recent discovery, however, has shewn that such publication by inscription, in very early times, may not be so apocryphal as it has been hitherto considered. The remarkable inscribed *Cippus*, unearthed near the Arch of Severus in 1899—a discovery which might not impossibly be followed by others of a similar character—casts a light upon Early Roman Law unknown to the classical writers of antiquity. On the possible interpretation of this document and its bearing upon the meaning of the word *lex* I shall have to speak in my preliminary chapter on Jurisprudence. Of its title to rank as an early primary authority there can be no doubt. The forms of the letters and the general style of the script stamp it, according to the best modern authorities, as probably of the sixth, certainly not later than the first half of the fifth, century B.C. Approximately the same date has been given, for similar reasons, to the great Cretan inscription at Gortyna, which has been lately much relied on as illustrating early Roman legal practice. To myself it appears, as in several other instances, to be an interesting and illustrative parallel development, but not a (juridical) source.

**The Gallic conflagration.** While, however, it is possible that we moderns may now have, or come to have, an original *lex regia* in our possession, it is more probable that the classical jurists had *not*, but that what documents they

<sup>13</sup> Mommsen, *Sr. ii.* 41—44: Karlowa, *i.* 106, 107.



knew under that name were, put at the highest, restorations. The destruction of the city by the Gauls is still left, I think, in its main features as historical even by Pais<sup>14</sup>. The date given by Polybius, 387 B.C., is perhaps the best authenticated<sup>15</sup>. In this conflagration, Livy tells us, the greater part of the scanty *literae* then existing in the commentaries of the Pontiffs, or in other public and private *monumenta*, was destroyed<sup>16</sup>. Search was made for such treaties and *leges* as might still be in existence—the latter being the Twelve Tables and certain *regiae leges*. Part was republished, but what related to sacred matters was suppressed, mainly at the instance of the Pontiffs, in order to keep the minds of the multitude under the control of religion<sup>17</sup>.

There is a look of unreality here, as often in the motives attributed by Livy to the older Romans. And, of course, to those who hold with Pais that, at the time referred to, there were no Twelve Tables, or *leges regiae* either, the whole story is a mere fiction, to account for the non-existence of early documents, or to give effect and dignity to subsequent forgeries. If we admit, on the other hand, the general truth of the received account, I would suggest that a more natural ground for suppression, than that given by Livy, might be found in the fact that the old semi-religious rules had by this time lost, in the main, their secular

<sup>14</sup> See, however, i. 2, 98, n. 3.

<sup>15</sup> That of the peace of Antalcidas, Polybius, l. 6. See, however, D. H. l. 74: Mommsen, Chron. 126 ff. 227, &c.

<sup>16</sup> Livy 6. 1, *parvae et rarae per eadem tempora litterae fuere, una custodia fidelis memoriae rerum gestarum, et...etiam si quae in commentariis pontificum aliisque publicis privatisque erant monumentis, incensa urbe pleraeque interiire.*

<sup>17</sup> *Ib.*, *foedera ac leges—erant autem eae duodecim tabulae et quaedam regiae leges—conquiri quae comparerent jusserunt. alia ex eis edita etiam in vulgus; quae autem ad sacra pertinebant, a pontificibus maxime, ut religione obstrictos haberent multitudinis animos, suppressa.*

importance. I am not, however, at present concerned with this particular question, nor with the general results, on Law and History, of the Gallic conflagration, but only with the fate of the alleged Papirian record. Being, as Dionysius tells us, "on sacred matters," this was not, according to Livy, republished, but would remain henceforth in the custody of the Pontiffs. It is to their records that we must look, after the Gallic conflagration, as the sole source, known to the Roman Jurists, of information on Royal laws or ordinances.

**The jus Papirianum of Pomponius.** Five hundred years after the destruction of the city we have Sex. Pomponius, a well-known jurist of the time of Hadrian, writing that the whole of the *leges regiae* were then extant, being contained in a book of Sex. Papirius, one of the chief men in the days of "Superbus the son of Demaratus the Corinthian." The book is styled, he adds, *jus civile Papirianum*, not that Papirius added anything of his own, but that he arranged together *leges* which had been carried (*latae*) without any systematic order<sup>18</sup>. "Superbus the son of Demaratus the Corinthian," to whatever source he is to be traced, is, I have little doubt, rather the work of some blundering commentator than a genuine part of Pomponius' *Enchiridium*, slipshod as that work is<sup>19</sup>. The praenomen Sextus may possibly be due to some scribe's confusion with a historical Papirius, pupil of Mucius Scaevola the Pontiff, mentioned later in the same *Enchiridium* (§ 42): in § 36 it is Publius. These fancy variations are, I have little

<sup>18</sup> Dig. 1. 2. 2. 2, quae omnes conscriptae exstant in libro Sexti Papirii, qui fuit illis temporibus, quibus Superbus Demarati Corinthii filius, ex principalibus viris. is liber, ut diximus, appellatur jus civile Papirianum, non quia Papirius de suo quicquam ibi adiecit, sed quod leges sine ordine latae in unum composuit.

<sup>19</sup> See Osann, Pomponi fragmentum, p. 22. For the story Livy 1. 34: Plutarch, Poplicola, c. 14: Pliny, N. H. 35. 12. 152, &c.

doubt due, as Mommsen suggests<sup>20</sup>, to the fact that the original compilation was simply styled Papirian, without further individualisation of the author.

Granius Flaccus, an author apparently of Caesar's time<sup>21</sup>, wrote *de jure Papiriano*, a work quoted by Paulus<sup>22</sup>, which possibly was the only *jus Papirianum* known to Pomponius. Mommsen and Girard would date the entire compilation, whether to be identified with the work of Granius Flaccus or not, as late as the time of Caesar or Augustus. Their ground is the not very conclusive one of silence on the part of earlier authors, e.g. Varro and Cicero. Pais relies on a passage of Pliny (N. H. 32. 20) as shewing that the compilation was known much earlier, e.g. to Cassius Hemina, and may therefore have been the work of some Papirius in the third century B.C., when we find members of the family, which he admits to have been very anciently connected with Roman *sacra*, holding high religious office<sup>23</sup>. All the Papirii of regal and early republican times he of course regards as fictitious ancestors invented for a family whose patriciate was somewhat questionable. Leaving out of the question the historical truth, or otherwise, of the earlier Papirii, I myself incline to the view of Pais.

But the date and the author of this book—which I need scarcely say has not been preserved to us—are comparatively unimportant. Its *title* deserves a few words of remark, before we come to consider the probable character of its contents, so far as we can judge from apparent extracts, and the value of those contents as approximately primary or only secondary sources.

*Jus* or *lex*. Not much stress need be laid on the "*jus*

<sup>20</sup> Sr. ii. 43. 1.

<sup>21</sup> See Censorinus, *de die natali*, c. 3.

<sup>22</sup> Dig. 50. 16. 144.

<sup>23</sup> Mommsen, Sr. ii. 43. 4: Girard, *L'histoire des XII Tables*, 3, n. 1: Pais, i. 1, 36, n. 5 and 396.

*civile Papirianum*" of Pomponius, who may only have seen the book of Granius Flaccus. It should, however, be remarked that such a style as *jus civile* is at once incompatible with any very early date in Roman legal history. The only *jus* which could have been specified in the first 500 years of the city would have been *jus Quiritarium* or *Quiritum*: *jus civile* is a phrase which cannot have arisen before the recognition at Rome of a supplementary jurisdiction *inter peregrinos* or *inter cives et peregrinos*, when it was required to mark out that older Roman Law, which belonged specially, if not exclusively, to the *citizens*. Into the other various significations which *jus civile* came, at one time or another, to bear I cannot enter here; nor into the original meanings of *jus* and *lex*. Suffice to say that the term *jus*, as applied to the Papirian compilation, must not be pressed as meaning *customary* law nor as excluding *statutory form*, either for individual clauses or, according to one authority, for the whole.

In Virgil's words *morem ritusque sacrorum adiciam*, the poet, says his commentator Servius, has used the exact title of the *lex Papiria*, which he knew was published on the subject of sacred ritual<sup>24</sup>. The expression of Servius is stigmatised as incorrect or inexact by Mommsen and Krüger<sup>25</sup>, and *lex* probably could not yet be used, even in Servius' time, for a whole body of Law. But, before that time, it could undoubtedly be said of a body of statutory enactments, if compiled or issued at one time<sup>26</sup>. There does not therefore seem to be any impropriety in calling the Papirian compilation a *lex*, when its individual clauses were the *regiæ leges*.

<sup>24</sup> De ritu sacrorum publicatam. Servius on Aen. 12. 836 (Bruns, i. 3).

<sup>25</sup> Mommsen, Sr. ii. 43. 3: Krüger, 5, n. 3.

<sup>26</sup> e.g. "*lex duodecim tabularum*": see also Zumpt, Criminal-recht der Römischen Republik, i. 34.

**Regiae leges.** \* On the subject-matter of these interesting though scanty records I shall have to speak hereafter: at present I have merely to consider their position and value as sources. They are represented, it will be remembered, by Pomponius<sup>27</sup> as *statutes* regularly *carried (latae)* by Romulus and subsequent kings. It will be pointed out, in the course of the following work, that enactment, in the republican sense, by or in conjunction with a popular assembly is, to say the least of it, very improbable in the Regal period: but that, on the other hand, there is no improbability in Regal *leges* as *ordinances made by proclamation* and, in some cases, perpetuated by public inscription. When the last-mentioned documents had disappeared, and the only record of the *leges regiae* was to be found in the Pontifical books, there was doubtless room for manipulation, and possibly for the interpolation of new rules, matter of practice, which would, as is found in other cases, be drawn up in the same express and imperative form as a published ordinance. The dates to be approximately assigned to our scanty remnants, depend mainly upon intrinsic evidence of subject-matter and linguistic form. But, on the general value, as Sources, of the *leges regiae*, considering their *provenance* and the story of their preservation in the so-called *jus Papirianum* I incline to believe that they were *bonâ fide* copies of ancient matter, which had been thrown into the form of rules or ordinances, and perhaps actually published, before the Twelve Tables, if not before the Republic itself. We only have them, I need not say, in a few stray quotations.

**Early Republican leges.** Much of what has been said as to *leges* of the Royal period applies to those traditionally enacted, before the Twelve Tables, under the Republic; of which our authorities occasionally cite what purported to be original documents existing in their own time. While

<sup>27</sup> Dig. 1. 2. 2. 2.

decidedly questioning any *legislation*, in the later republican sense, earlier than the Code, I see no fatal improbability in predecemviral *ordinances* or *proclamations*, by the chief magistrates (no doubt under the authorisation of the Senate), which were in some cases recorded by public inscription; while others can scarcely have been so preserved, from the discrepancy or practical inconsistency of our references, as to their contents.

To the former class may belong the *lex vetusta* of a plaque once fixed to the side of Jupiter's temple on the Capitol, inscribed, we are told, "in ancient words and letters," which therefore either Livy or his authority Cincius would appear to have actually seen<sup>28</sup>; also the *lex de Aventino publicando*<sup>29</sup>, still existing in Dionysius' time (29-7 B.C.) on a bronze pillar or *cippus*<sup>30</sup>, though the preservation of the original monument through the Gallic conflagration is, in this case, inconsistent with the generally received account, from its exposed locality, on the Aventine. (It is scarcely necessary to say that the whole story in both these cases is treated as pure fiction by Pais, and the documentary records as "pious frauds.")

To the latter class must belong those earlier recognitions of the right of *provocatio*, in which we seem to see some historical fact, although the connexion with them of so many successive Valerii may be simply due to the later peerage-writers of that great family<sup>31</sup>.

**The Twelve Tables.** I pass now to the Decemviral legislation, which I still believe to have actually occurred about the time at which it is usually dated, i.e. 450 B.C.<sup>32</sup>

<sup>28</sup> Livy, 7. 3. L. Cincius Alimentus was Praetor 210 B.C. On the question whether this was he, see below, § 3, p. 69. Further on this *lex*, § 2, p. 35.

<sup>29</sup> Livy, 3. 31.

<sup>30</sup> D. H. 10. 32.

<sup>31</sup> See Pais, i. 570, 571 and below, § 2, pp. 53, 57.

<sup>32</sup> See Lewis, ii. 242 and M. Girard's recent criticism of Pais and Lambert in *L'histoire des XII Tables*, *Nouv. Rev. hist. de droit français et étranger*, 1902.

That memorable Code, different from the scattered *leges regiae*, we might have expected to have survived *en bloc*. We have, in fact, only a few disjointed fragments; and, though the probable *order* of these may be made out with some degree of confidence, any modern attempts at a reproduction of the Code *in extenso* are simply misleading<sup>33</sup>.

As to the sources of our authorities, Livy<sup>34</sup> would seem to intimate that the actual tablets, inscribed and published sixty years before, were found in existence after the burning of Rome. But the improbability of any permanent preservation of the originals is shewn by the diversity of our authorities as to their alleged *material*—bronze, ivory (!), or oak<sup>35</sup>. Moreover, had there been handed down either an original or a copy made directly after the conflagration, it is well argued by Schöll<sup>36</sup> that our existing fragments would scarcely have exhibited such comparatively modern forms as R, I, U, in cases where we should have expected S, E, O; different characters for C and G; loss of D final in the ablative and imperative, &c. A semi-metrical cadence, which may be occasionally traceable, Schöll appears, though not very explicitly, to refer to a temporary oral transmission of the Code<sup>37</sup>. I should rather believe it, if real, to be a *remanet* from the older materials which were undoubtedly incorporated by the Decemvirs. With regard to internal evidence derived from subject-matter, as this is one of Pais' main arguments for a later compilation of the XII<sup>38</sup>, I may say once for all that it would seem an absolute impossibility for such provisions as those of *talio*, *suspensio Cereri*, *sacratio*

<sup>33</sup> Voigt's *Die XII Tafeln* scarcely professes to be this, however it may deserve the censure of Pais (i. 573) as "a learned jumble."

<sup>34</sup> Above, n. 16. See too Karlowa, i. 108.

<sup>35</sup> Livy, 3. 57, in *aes incisas*: so too D. H. 10. 57, *σφῆλαις χαλκαῖς*: but Pomponius, Dig. 1. 2. 2. 4, in *tabulas eboreas* (Fl.): *roboreas* is the almost certain emendation preferred by Osann, Pomp. de O. J. 26: Sanio, Varoniana, 99, &c.

<sup>36</sup> Rell. 6.

<sup>37</sup> Ib. 4.

<sup>38</sup> Pais, i. 574, 575.

*patroni*, &c.<sup>39</sup>, to have been retained by a great reformer like Ap. Claudius Caecus, if he had been the first draughtsman of the Twelve Tables, at the end of the fourth century B.C.

The contents, then, of the Twelve Tables were probably handed down, not by one early and durable archetype, but by copies from time to time renewed, with such slight alterations creeping in, as would be required, in form if not in substance, for a Code still in practical use. There remain archaisms enough among our fragments, both in form and syntax<sup>40</sup>, to exclude the idea of any wholesale modernisation; though the more pronounced specimens of ancient speech certainly occur rather in the remnants of *predecemviral* law, less worn by use or it may be more superstitiously revered, and thus better preserved in their original condition, like the primeval liturgies of the Salii and the Arval Brethren.

The further modernisation of the Code may very probably have been arrested, and the stage which it had attained have been stereotyped, by a work evidently extant in the time of Pomponius—the *Tripertita* of Sex. Aelius, consul 198 B.C., which contained the text as one of its portions<sup>41</sup>. Its author was admired and quoted by Ennius (*b.* 239, *d.* 169 B.C.), whose readers, as well as the audiences of Plautus (*b.* 227, *d.* 184 B.C.), seem to have been familiar with a recension, at least of part of the Twelve Tables, sufficiently modernised to be intelligible to them<sup>42</sup>. It must be borne

<sup>39</sup> Tab. viii. 2, 9, 21, in Schöll's numbering.

<sup>40</sup> See Schöll, 70, 76, 78, 79, 92, 102, 106, &c.

<sup>41</sup> Dig. 1. 2. 2. 38. The description is more that of an eye-witness than the general terms in which he speaks of the *jus Papirianum*.

<sup>42</sup> Pomponius, *ib.*, and Cicero, de Orat. 1. 45. 193, Sic appellatus a summo poeta est "egregie cordatus homo Catus Aeli' Sextus." Cf. Tusc. Disp. 1. 9. 18. As to quotations see, for Ennius, Priscian, 7. 18. 93, cf. Macrobius, Sat. i. 4. 19; for Plautus, Curc. 1. 1. 4, cf. Cicero, de Off. 1. 12. 37. Further, Schöll, 8, 9.



in mind that even this early version was written from a practical not a historical point of view; and it is probable that most of the genuine fragments of the original which we possess are due to the Antiquarians, such as L. Aelius Praeconinus Stilo (see below, § 3, p. 68), drawing rather from the Pontifical books than from the Code in actual use.

The *lex Aebutia* (c. 176 B.C.) did away with much of the importance of the Twelve Tables in practice, the procedure based upon them being, however, still retained in the Centumviral Court<sup>43</sup>. This retention was probably the main reason for commentaries being written upon the Code, so late as Cicero's time by his contemporary Ser. Sulpicius Rufus, and later by Antistius Labeo<sup>44</sup>; though it may be doubted whether they dealt so much with rules of ancient Law as with the explanation of individual words and phrases. The same remark applies to Gaius' "*ad legem XII tabularum*," cited some twenty times in Justinian's Digest; which, moreover, in spite of its somewhat ambitious preface<sup>45</sup> is considered with justice by Schöll<sup>46</sup> to be rather a comment on former commentators than on the statute itself. Indeed, as early as Cicero's time, the Code *in extenso* would seem to have become more matter of historical or antiquarian interest than of practical Law. In his youth, he tells us, boys used to be taught the Twelve Tables—perhaps in a metrical version<sup>47</sup>—but that practice had ceased when the *de legibus* was written (begun 52, resumed 46 B.C.). The manual for learners was then no longer the old Code, but the Praetor's Edict<sup>48</sup>.

<sup>43</sup> A. G. 16. 10. 8, Cum...omnis illa xii tabularum antiquitas, nisi in legis actionibus centumviralium causarum lege Aebutia lata consopita sit.

<sup>44</sup> Dig. 50. 16. 237: A. G. 13. 10. 1.

<sup>45</sup> Dig. 1. 2. 1.

<sup>46</sup> Schöll, 34.

<sup>47</sup> Cicero, *de legibus*, 2. 23. 59, discebamus pueri xii ut carmen necessarium (cf. *de Orat.* 1. 57. 245, in magistri carmine), quas jam nemo discit. As early as Plautus boys learned *jura* and *leges*, *Most.* 1. 2. 43. See further, Krüger, 13, n. 3.

<sup>48</sup> Cicero, *de legibus*, 1. 5. 17.

A passage of St Cyprian, *ad Donatum*, written about 245 A.D., which is taken by Schöll to prove the existence of a bronze copy of the XII at that time, in the market-place of Carthage, seems to me purely rhetorical<sup>49</sup>. It would appear that some version was still taught at Narbonne by Leo, a remote descendant of the rhetorician Cornelius Fronto, celebrated in the hendecasyllabics of Sidonius Apollinaris, who corresponded with him, between 462 and 466 A.D.<sup>50</sup> Some interest attaches to this rhetorician from his connexion with that brief Visigoth sovereignty in Provence to which we long owed the only continuous version of Gaius' Institutes. Leo of Narbonne was summoned to Toulouse by Euric, A.D. 466, and was subsequently the private secretary and counsellor of that king and his successor Alaric II, the author of the *Breviarium* in which the Niebuhrian Gaius was contained<sup>51</sup>.

This story about the teaching of Leo is the last that we hear of the Decemviral Code being treated as an independent entirety. We moderns have to piece together some of its fragments from fragmentary quotations by Cicero and the Jurists, or, more frequently, from the notes of Antiquaries or "Grammarians," who preserved stray phrases as literary curiosities and specimens of old Latin.

**Later original documents.** In respect of public or official record, nothing similar to the Code of the Twelve Tables appears to have existed till very late in the Republic, if then. The books on Civil Procedure by C. Flavius (c. 304 B.C.) and Sex. Aelius (c. 190 B.C.) would practically amount to *primary* evidence as to the law in use at the time of the writers. But the *jus Flavianum* and *jus Aelianum*, though possibly known to Pomponius<sup>52</sup>, are to

<sup>49</sup> Schöll, 16 : see, however, Krüger, 12, n. 7, and Karlowa, i. 108, n. 4.

<sup>50</sup> Schöll, 18 and Praef. vii.

<sup>51</sup> See Teuffel, ii. p. 479 (§ 466. 7).

<sup>52</sup> Dig. 1. 2. 2. 7.

us mere names. For all the older Roman Law, with the one remarkable exception above referred to (p. 14), we have to rely upon secondary Sources, varying from direct quotations, which sometimes purport to be made not only *verbatim* but *litteratim*, to obviously modern paraphrases or mere general statements. The comparative value of such secondary Sources, with a short notice of the principal authorities, is the subject of the following five sections.

But, from early in the second century B.C. a certain amount of *primary* evidence becomes available. Original, if not official, sources of knowledge as to Roman Law begin to appear, in the shape of inscribed stones, metal plaques, or, later, wooden tablets and papyri which have been and still are being discovered by treasure-hunters or archaeologists.

**Leges.** It is a complaint of Cicero (c. 46 B.C.) that there was no official depository of the public enactments in his time: the *leges* were to be sought for in private collections and the magistrates had, not unlike modern magistrates, to depend upon their clerks for the law which they administered<sup>53</sup>. This deficiency he probably meant to supply in the latter part of the *de legibus*, which was never completed. But, whether official or not, there can be little doubt in the mind of any reasonable person that the *leges* and *senatusconsulta* quoted from bronze or marble in Bruns' Fontes (of which the *Scutum de Bacanalibus* is the earliest, 186 B.C.) may be accepted as contemporary copies, and therefore Primary Sources. The bearing of these authorities is seldom directly on Private Law: but in incidental references to procedure they have repeatedly thrown the most valuable light upon obscure parts of that subject.

<sup>53</sup> Cicero, *de legibus*, 3. 20. 46, *Legum custodiam nullam habemus. Itaque eae leges sunt, quas apparitores nostri volunt: a librariis petimus, publicis litteris consignatam memoriam publicam nullam habemus.*

**Negotia.** A much larger and a rapidly increasing original source belongs strictly to secondary, but in practical value, like the lost *jus Flavianum* and *Aelianum*, to primary evidence of law. I refer to what are called by the general term *negotia*, records of some private legal transaction. In such documents we have, of course, first-rate evidence as to current legal practice, and they are in most cases exactly dateable. Such documents, in a very wide sense of *negotium*, are to be found in Bruns' *Fontes* and Girard's excellent *Textes de Droit Romain*. As fresh discovery or new interpretation is continually adding to this important branch of sources, the last edition of the works indicated should always be consulted.

**The Edict, Constitutiones and Digest.** Various literary documents coming from the Empire must be regarded as practically Primary Sources though we have not the originals or, in all cases, full copies. That Codification, for instance, of substantive and adjective Law, the Edict of Hadrian, has, like the Code of the Twelve Tables, only come down to us in fragments. The individual clauses, however, cited by the Jurists of Justinian's Digest and a few other authorities, are so obviously literal extracts that they may be taken as representing *pro tanto* the original text. These have been collected and supplemented, notably by Lenel; the whole Edict, so far as it can be restored, being printed in Bruns and Girard.

*A fortiori* is the same primary character true of the various Imperial *Constitutiones* preserved in the four Codes (*Gregorianus*, *Hermogenianus*, *Theodosianus* and *Justinianus*) with the later *Novellae*. Justinian's Institutes, too, and the extracts constituting his Digest are, through his general enacting clause<sup>54</sup>, Primary Sources for the Law of Justinian's time. The same extracts are, however, also, like the *negotia*

<sup>54</sup> See Const., *Tanta circa*, § 23.

above-mentioned, equivalent to primary evidence of Law current at the date when they were respectively written. As to the actual *legislative* authority enjoyed by the *responsa prudentum*, before Justinian's adoption into his Digest, there is still room for considerable difference of opinion<sup>55</sup>.

<sup>55</sup> See Clark, P. J. ch. ix., and article on Papinian, Journal Soc. Comp. Leg. N. S. i. (1902).

## SECONDARY SOURCES IN THE PRELITERARY PERIOD.

Our immediate authorities, p. 28. The credibility of early Roman History, 29. Earliest records, Pontifical Commentarii, 31. Annales, 32. Libri magistratum, 33. Early Senatusconsulta, 34. Clavus Anni, 34. Meagreness of early records, 36. Results of Gallic conflagration, 387 B.C., 37. Restored history: the foundation legend, 40. Story of Aeneas, 41. The obviously fictitious, 42. The possible amount of truth, 43. Romulus and Alba, 45. Numa, Tullus, Ancus and the Tarquins, 46; length of the reigns, 48; poetical stories, 49. Early republican History, 50; part played by family tradition, 51; general result fairly true, 54; family *commentarii*, 56; funeral orations, pedigrees, &c., 59. Coriolanus and Manlius, 60. Livy, &c. on the falsification of History, 62. The patrician Claudii of History, 64. Conclusion, 65.

§ 2. **Our immediate authorities.** It was pointed out, in the preceding section, that our possession of original documents, or full copies of such documents, bearing on Roman Law does not, with one recently discovered exception, begin before the second century B.C. But we must further note that the writers upon whom we actually rely for *secondary* evidence—the earliest specimens of a Roman literature in which we find any information on Law<sup>1</sup>—only come into existence about the same date, when we begin to find incidental references to contemporary legal practice in such Comic Dramas as have been preserved to us. I shall have to speak hereafter (§ 4) on the practically primary

<sup>1</sup> No surviving fragments of Livius Andronicus (c. 284—204 B.C.) have any bearing on Law.

value of the evidence just referred to—for the writer's own time. For all the Law of the preliterate period—all, to speak roughly, before 200 B.C., when the basis had long been laid upon which the vast structure left us by Justinian ultimately rests—we have to rely upon evidence, not merely secondary in character—as consisting of incidental references, fragmentary quotations, paraphrases or general statements—but coming directly to ourselves, for the most part, from writers of our own era or very little before it; five centuries after the reputed establishment of the Republic, seven and a half after the traditional foundation of the City. It is, accordingly, to the possible sources of these, our immediate authorities, in the preliterate period, that some considerable portion of our enquiry must be directed—an enquiry thus extending to one branch at least of that difficult subject, the credibility of Early Roman History. Of wars and foreign affairs generally we may steer fairly clear; but it has been already pointed out (Int. p. 4) how impossible it is to separate Roman Private Law, in its origin, from that traditional framework of the Roman domestic Polity, on which modern criticism every day casts fresh doubts.

The credibility of Early Roman History in general, shaken long ago by the scholar-like "Inquiry" of Sir G. C. Lewis, has recently received an intended death-blow from Professor Ettore Pais, in his voluminous *Storie*, which must, in any case, be taken into leading account by all future writers on the subject. Not only the Kings and their laws, but the early Consulate and Tribunate, and the Decemviri too, are here relegated to a region of fable. The Code itself first comes into existence as a compilation or composition of Ap. Claudius Caecus and Cn. Flavius. This last blow has not passed, however, without a *riposte*. The particular battle of the Twelve Tables has been fought, to my mind successfully, by their able defender M. Girard in the *Nouvelle*

Revue historique de Droit of 1902. On the history in general subjected to this, perhaps the farthest, extreme of sceptical analysis, I shall only here make one or two remarks which I will endeavour to substantiate hereafter by individual instances.

The main constituents of early Roman History, suggested by Professor Pais, are—on the one hand, pure invention and the servile reproduction of foreign history, legendary or otherwise—on the other, anticipation, sometimes doubled or trebled, of actual later events, and mostly framed for the glorification of particular families, who had official opportunity for falsifying what little existed of true record.

As to the former—the inventions or copyings—I am disposed to admit large part of Pais' conclusions (which had been mostly arrived at before by Sir G. C. Lewis); though some of the coincidences pressed by him are so strained or distant that it is easier to recognise a native, if obscure, original, than to find a definite foreign one. As to the theory of continual anticipations, while I agree that Pais' criticism may demolish, successfully enough, a good deal of the personal element and the individual attribution, he does not seem to account sufficiently for an impersonal series of events, not involving any intrinsic improbability, upon which authorities drawing from different, sometimes antagonistic, sources, were evidently agreed at quite an early period. Moreover, apart from any such general agreement, some at least of the falsifications alleged by Pais would seem to be objectless and gratuitous; while, in the phraseology occasionally recorded, we find stray indications of antiquity only intelligible to modern philological science, which no ancient etymologer, certainly no mere historian, could have dreamt of inventing<sup>2</sup>.

<sup>2</sup> Take e.g. the still unexplained *paricidas* of "Numa's" law (Festus P. Parrii, 221) and Plutarch's strange interpretation, Romulus, c. 22.



**Earliest records, Pontifical Commentarii.** To come however to particulars:—our own immediate authorities for the earlier stages of Roman Law may be roughly divided into (1) Historians, juristic or general; (2) Poets, men of business or other writers of general literature; (3) Antiquaries; (4) Jurists. Their direct contributions to our knowledge will accordingly be treated in the four following sections. The present one is devoted to a consideration of *their* sources of information, ultimate or immediate, in the old time before them. This subject falls into two parts—the records alleged to have existed before the destruction of the city by the Gauls and those which were “restored” and continued after that catastrophe.

Apart from the possible *publications* above referred to (§ 1, pp. 14, 20), the only original repository traceable, of the primeval beliefs and customs, on which the *jus Quiritium* was based, must be found in the succession, practically corporate, of the Pontiffs. As a literary source, their records are clearly proved by many references, both of Cicero and the Roman antiquaries in the Augustan period, to have been the chief authority for any old law other than that of the Twelve Tables. These documents are described as *libri*, or more specifically as *commentarii*, memorandum books. The latter term may possibly cover some individual record of any very important *cause célèbre*<sup>3</sup>; but the early legal matter which has been preserved to us from the *commentarii* is rather in the generalised shape of *formulae* or prospective rules<sup>4</sup>.

In some cases we find early *commentarii* styled *regii*—for instance the attribution of what was practically a draft constitution to Servius Tullius<sup>5</sup>: an alleged project which, though in itself apocryphal enough, may have been suggested

<sup>3</sup> See Clark, P. J. 284; E. R. L. 55, 57; and above, § 1, p. 13.

<sup>4</sup> See Karlowa, i. 107.

<sup>5</sup> Livy, i. 48, 60.

by some early notes of the military organisation connected with that name<sup>6</sup>. 'Προμνήματα too (= *commentarii*) of Numa are referred to by Plutarch<sup>7</sup>, as the traditional origin of the *lex de spoliis opimis*, which Varro, though he attributes it to the same King, obviously found in the *libri pontificum*<sup>8</sup>.

Such being the historical *provenance* of *regii commentarii* it is unnecessary to rely on the very probable development, in prehistoric times, of the regal from the priestly office, or on the fact that the *Rex* was always a *Pontifex* and once the chief of them. Neither shall I here enter into the question of actual legislation by the Kings (which will be fully discussed elsewhere), or the possible degree of significance which we may find in the attribution of this or that particular ordinance or institution to this or that traditional name. Such attributions I take to be, for the most part, the work of later times, and attach no practical importance to the distinction of pre-republican *commentarii* as *regii* or *pontificales*<sup>9</sup>.

**Annales.** Besides the *commentarii* we have also attributed to the Pontiffs, from the earliest times, certain general *annales* or yearly records, which were posted up for public inspection, probably in an abbreviated form. As to their contents in the later and more historical period, we know, by a quotation from Cato's *Origines*, written probably about 170 B.C., that a tablet was then kept at Rome, in charge of the *Pontifex Maximus*, on which were from time to time noted down such events of public interest as eclipses, unusually high prices of corn, &c.<sup>10</sup> Cicero, in the passage

<sup>6</sup> See Festus on the *descriptio centuriarum* and *classium* s. vv. Pro censu and Procu, F. 246, 249.

<sup>7</sup> Marcellus, 8, φασιν ἐν τοῖς προμνήμασι Νουμῶν . . . μνημονεύειν.

<sup>8</sup> Varro apud Festum, Opima, F. 186, 189.

<sup>9</sup> See too Pauly's Encyclopaedia, article Commentarii.

<sup>10</sup> A. G. 2. 28. 6, Verba Catonis, ex Originum quarto, haec sunt. Non lubet scribere quod in tabula apud Pontificem Maximum est, quotiens

above referred to<sup>11</sup>, represents this as extending to a publication of all the transactions of each particular year, which practice continued, he says, from the beginning of Rome to the Pontificate of P. Mucius Scaevola, Consul 133 B.C., the records in question being still (55 B.C.) called the *Annales Maximi* (see further below § 3, p. 73).

Our only other authority of any importance on the subject is a note of Servius on Virgil, Aen. 1. 373, which besides stating the entry in detail, day by day, of events worthy of note, adds that each yearly record was prefaced by a list of magistrates for the year, and that the whole was reduced by *veteres* into 80 books, called *Maximi* from their original authors<sup>12</sup>. This reduction we may fairly place about Cicero's date for the close of the series, i.e. the Pontificate of Scaevola, who was probably the editor<sup>13</sup>.

The *Libri magistratum*, or lists of magistrates for the year, occasionally mentioned by Livy, have been sometimes connected with the above: but they are apparently distinguished by that author from the *Annales prisci* or *veteres* as not an equally old authority<sup>14</sup>: in fact they were probably the same as the *libri lintei* deposited in the temple of *Juno Moneta* which was not dedicated till 344 B.C.<sup>15</sup>

annona cara, quotiens lunae aut solis lumine (old dative) caligo aut quid obstiterit. On the probable date of Book 4 see Teuffel, i. § 120. 2.

<sup>11</sup> Cicero, de Oratore, 2. 12. 52, Ab initio rerum Romanarum usque ad P. Mucium pontificem maximum res omnes singulorum annorum mandabat litteris pontifex maximus efferebatque in album et proponebat tabulam domi, potestas ut esset populo cognoscendi; iique etiam nunc annales maximi nominantur.

<sup>12</sup> Servius, ad Aen. 1. 373, Ita autem annales conficiebantur. Tabulam dealbatam quotannis pontifex maximus habuit, in qua, praescriptis consulum nominibus et aliorum magistratum, digna memoratu notare consueverat domi militiaeque terra marique gesta per singulos dies, cujus diligentiae annuos commentarios in octoginta libros veteres retulerunt, eosque a pontificibus maximis, a quibus fiebant, annales maximos appellarunt.

<sup>13</sup> See Teuffel, i. 189, § 133. 4. Also below, § 3, p. 73.

<sup>14</sup> Livy, 4. 7. 20.

<sup>15</sup> Livy, 7. 28. Also below, p. 51.

**Early *Senatus Consulta*.** Some separate record of the resolutions of the Senate was also, according to Livy<sup>16</sup>, arranged to be kept, by the Plebeian Aediles, from the institution of that office, at the temple of Ceres. Whether this arrangement was carried out is matter of question<sup>17</sup>, though it would certainly seem that so soon as *Plebiscita* began to be recognised as generally binding, if they received the previous or subsequent sanction of the Senate, some such independent record of that sanction would be required<sup>18</sup>. Modern scepticism of course goes much further, with regard to the first Secession, than criticism of such a detail as this alleged arrangement about the *Senatus Consulta*. For my own part I cannot but believe, not only that popular memory preserved at any rate the main facts of the original establishment of Tribunicial power, under concession by the Senate, but that some note of the negotiations was most likely committed, at the time, to documentary archives somewhere<sup>19</sup>. Livy, however, takes no notice of the preservation of any record from the temple of Ceres, in his account of the conflagration: and it must be remembered that the position of this temple did not secure it the immunity enjoyed, according to the story, by that of Jupiter on the Capitol<sup>20</sup>.

**Clavus Anni.** To these may be added another and a very primitive yearly record, which, though more limited in its scope, is more likely to have been preserved than any of those already mentioned. I refer to the register of Consular years by nails driven into the wall of the Capitoline temple of Jupiter; an ancient practice attested by that *lex vetusta* of which I have spoken above (§ 1, p. 20) as existing in the time of Livy or his authority Cincius. The *plaque*

<sup>16</sup> Livy, 3. 55.

<sup>17</sup> See Mommsen, H. i. 284.

<sup>18</sup> Mommsen, Sr. ii. 476. 1.

<sup>19</sup> See below, pp. 52, 55, and Lewis' grudging admission, ii. 83.

<sup>20</sup> As to the identification of this temple of Ceres with St<sup>a</sup> Maria in Cosmedin, see Burn, 292, and Middleton, ii. 192.

on which the *lex* was inscribed—and which, whether the original or a copy, evidently retained the antique words and characters—represented one formerly affixed to the right-hand side of the temple, where stood the chapel or aisle sacred to Minerva, the inventress of *number* according to Livy<sup>21</sup>, the goddess of *intellect* or *memory* according to modern Philology<sup>22</sup>. *Promenervat* is an old word for *bringing to mind* in the Salian hymns<sup>23</sup>.

This *lex* provided for the “fixing of the nail,” by that person who should at the time be “*maximus praetor*,” on the Ides of September, the day when, according to Plutarch<sup>24</sup>, the temple of Jupiter was dedicated. Livy also, in a somewhat ambiguous sentence, makes the same *lex* provide for or record the original act of dedication, in the year after the expulsion of the Kings; from which date the annual practice *clavi figendi* had been carried on for some time by the Consuls, then transferred to occasional Dictators, but discontinued before the year 363 B.C. in which he describes its revival. The fixing of the nail at all, as a yearly practice, is discredited by Mommsen<sup>25</sup>, who considers it to have been from its first institution, possibly in the “sad September” of 463 B.C., a religious ceremony vowed to be repeated at secular periods of time—as in our days the more frequently recurring Passion play of Ober Ammergau. The *lex* Mommsen, no doubt correctly, regards as simply a temple order or document of foundation: but his reasoning as to its object scarcely seems sufficient to set aside the testimony of the Augustan antiquary Cincius, in addition to what other annalistic authority Livy may have had for his account. In particular we may note the allegation, by Cincius, of a

<sup>21</sup> Livy, 7. 3, eoque Minervae templo dicatam legem, quia numerus Minervae inventum sit. See the whole of this interesting chapter.

<sup>22</sup> Corssen, ii. 268; Curtius, 312.

<sup>23</sup> Festus, F. 205, Promenervat item pro monet (? promonet).

<sup>24</sup> Plutarch, Poplicola, c. 14.

<sup>25</sup> Chron. 176—179.

parallel register at Volsinii in the temple of Nortia, an Etruscan goddess, who has actually been identified by some authorities with the Roman Minerva<sup>26</sup>.

The discontinuance of the practice, as a record, may well have been due to the substitution of a fuller memorial after the Gallic conflagration. Its revival, on occasion, for superstitious, or probably political reasons, and the significance of the term *praetor maximus* will be considered elsewhere.

The *plaque* must be understood, from Livy's expression *fixa fuit*, to have been removed from the temple walls—possibly in the so-called "suppression" of sacred matters (Livy, 6. 1)—and the original or a copy preserved in the Pontifical Archives. As to the nail-register itself, since consistent tradition represents the Capitol as saved, there seems no reason why this record should not have been preserved intact; but it only extended to the tale of years. On the possible connexion of the period thus established with the traditional duration of the preceding Monarchy, see below, pp. 48, 51.

**Meagreness of early records.** To return to the *Annales*, modern criticism may be justly inclined to question their dating, as Cicero alleges, *ab initio rerum Romanarum*. A comparatively late date, indeed, has been confidently assigned as the commencement of noting down *prodigies*<sup>27</sup>. This was the year 249 B.C. in which the unlucky disregard of omens by P. Claudius Pulcher is so conspicuous an event. There does not seem to me any great improbability in the *initium* of Cicero having really been the beginning of the Republic. As the years of popular government, after tyranny, were to be noted by the nail-register, would not some record also be natural, of the main events affecting the Commonweal?

<sup>26</sup> See Dennis, *Cities and Cemeteries of Etruria*, i. lv.

<sup>27</sup> See Teuffel, i. 108, § 76. 4.

But, whatever the commencement of these earlier *Annales*, there is no question about their brief and meagre character, which naturally communicated itself also to the first so-called historians. Fabius and Cato, Piso and Venonius are specially noted by Cicero in this respect<sup>28</sup>. This feature of the original *Annals* may possibly be recognised, as is noted by Peter<sup>29</sup>, in the short summary of the events of a year which Livy frequently gives directly after the names of the Consuls. The same author draws an interesting parallel between such passages in Livy and somewhat similar ones from the early monkish *Chronicles* of Germany. We may also compare the older part of our own Anglo-Saxon *Chronicle*.

The contribution, then, of these original records to earlier *legal* History would scarcely be more, at the outside, than a statement of such acts of legislation or constitutional compromise as occurred under the particular Consulate, set down in the briefest terms. The yearly publication would suffice to connect, during the space of popular memory, the general effect of such changes with the names of the presiding magistrates or, it may be, of non-magisterial proposers. But, as to the accumulating record of past years, it must be remembered that the Archives of the Pontiffs generally are represented as a professional secret till four years before 300 B.C. when the College ceased to be exclusively patrician—if indeed the publication of Cn. Flavius in the former and the passing of the *lex Ogulnia* in the latter year are not parts of one and the same movement.

**Results of Gallic conflagration, 387 B.C.** So far then

<sup>28</sup> Cicero, de legibus, l. 2. 6, Nam post annales pontificum maximorum, quibus nihil potest esse jejunijs, si aut ad Fabium aut ad eum, qui tibi semper in ore est, Catonem aut ad Pisonem aut ad Fannium aut ad Venonium venias, quamquam ex his alius alio plus habet virium, tamen quid tam exile quam isti omnes?

<sup>29</sup> ? K. Peter, Gesch. xxiii. xxv. I cannot now verify this reference, made some years ago.

as we can trace the official record of Law and legal History which may have existed at the destruction of the City by the Gauls, it seems to have consisted in two distinct classes of *monumenta* or memoranda—one, including the Twelve Tables, the matter represented as published by Papirius, with one or two other *leges vetustae* of the Republic (§ 1, pp. 13, 20), and the *Annales* (though not probably for more than the current year), open to public view: the other, and the larger one, including the remaining customary and formal Law—also, it is suggested, the former *Annales*, or their matter—not so open. For the last though in a sense “public” as being official were probably, in actual knowledge, confined to the Pontifical board.

This conclusion is fairly in accordance with Livy’s account of the *litterae* then existing (above, § 1, notes 16, 17). The *treaties* of which he also speaks do not enter into our present enquiry: to the *privata monumenta* I shall return presently (below, pp. 51, 57).

It seems mere arbitrary scepticism to doubt the general truth of Livy’s narrative as to the destruction of the main part of these records in the burning of the city, the survival of a small remainder and its part publication (above, § 1, p. 15). The latter according to him only extended to the secular part of the Twelve Tables: of any other predecemviral republican *leges*, though secular, we do not hear that they were published; nor were the *leges regiae* if, as we are told elsewhere, the only surviving ordinances of Royal institution were on sacred matters (above, § 1, pp. 13, 15).

All religious forms and rules, and all forms which, though recognised in or based on the Twelve Tables did not form definitely part of the Code, were also, no doubt collected, pieced together from surviving documents or professional recollection, and replaced in the Pontifical Archives. With regard to that “suppression” of which we read in Livy,



whether the motive suggested by him was consciously entertained at the time, may be questioned. Much of the suppressed matter had probably become, like the "laws of Numa," except for mere ceremonial, obsolete; though individual regulations, like that in Livy's "*lex vetusta*" (above, p. 36), may have been subsequently revived for political purposes.

The *fasti*, so called, according to the Roman explanation, from shewing when pleadings could and could not take place, were no doubt primarily a religious table, although it could scarcely be long before the retention of such knowledge, secularly so important, as a professional or hierarchical secret, became a serious popular grievance<sup>30</sup>. The *fasti*, and the forms of procedure known as *legis actiones*, were we know "published" in 304 B.C. by Cn. Flavius, together apparently with other matter called by our historians *jus civile*. What was the exact meaning of the last phrase and how far the "publication" extended are matters for later discussion.

We may take it then as fairly well established that, after the burning of the City, all documentary sources of knowledge for the older Law and History, of an official character, were, with the exception of the Twelve Tables, exclusively kept in the Pontifical Archives and subject to Pontifical revision or manipulation. From the conflagration onwards, an increase of authentic contemporary records is vaguely intimated by Livy. "The deeds at home and abroad, of a city springing afresh from its old stock in more abundant and fruitful growth, may be set forth with greater clearness and certainty from this its second origin<sup>31</sup>." Even yet however, and particularly as to the next 50 years, we find frequent conflicting statements in the History that has come down to us—sometimes as to events and actions; sometimes, these

<sup>30</sup> Livy, 9. 46. 5.

<sup>31</sup> Livy, 6. 1.

being admitted, as to motives and effects<sup>32</sup>. Partly this seems due to discrepancies in official or quasi-official records themselves, but largely also to the interested perversions or misrepresentation of private family *monumenta*. On the particular forms of this last disturbing element I shall have to speak more fully later on (below, pp. 59, 60): at present my object is to consider how or from what sources, in general, the public record of events prior to the conflagration may have been restored and supplemented, notably in the particular cases forming part of the History of Law. "Restoration," and that, too, in the invidious sense familiar to students of architecture, is a term emphatically correct in this case. A great deal of the story once known to "every schoolboy"—some too of its more romantic and interesting parts—we must regretfully admit to be pure invention or mere copying of foreign matter (see above, p. 30). And yet, under a mass of false detail there may sometimes be a substratum of truth.

**Restored History.** The foundation legend. There was a settled version of the foundation of the City, in the second year of the seventh Olympiad<sup>33</sup>, inscribed on a tablet in the custody of the Pontiffs, which, from certain expressions of Dionysius, we may possibly infer to have been seen by the Greek historian Polybius writing about the middle of the second century B.C.<sup>34</sup> A good deal more than this however was of faith before Polybius' time.

<sup>32</sup> See Lewis, ii. 360, 380, &c.

<sup>33</sup> On this and other dates for the foundation of Rome see Clinton, F. H. i. 158; iii. Int. xix.

<sup>34</sup> D. H. 1. 74. 3, οὐ γὰρ ἤξιουν ὡς Πολύβιος ὁ Μεγαλοπολίτης τοσούτον μόνον εἰπεῖν, ὅτι κατὰ τὸ δεύτερον ἔτος τῆς ἐβδόμης Ὀλυμπιάδος τὴν Ῥώμην ἐκτίσθαι πείθομαι, οὐδ' ἐπὶ τοῦ παρὰ τοῖς ἀρχιερεῦσι κειμένου πίνακος ἐνὸς καὶ μόνου τὴν πίστιν ἀβασάνιστον καταλιπεῖν, ἀλλὰ, κ.τ.λ. For his own actual βάσανοι see below, p. 57. In the passage here cited ἀρχιερεῖς is Niebuhr's reading, generally accepted, for ἀρχιστεῖς which is unmeaning; nor can a variant ἀρχιστεῖς be sufficiently supported by reference to an imaginary town

The oldest Roman historians, Q. Fabius Pictor and L. Cincius Alimentus, who wrote shortly after the second Punic War, while entering naturally into detail as to matters within their own experience, gave only a summary of earlier events<sup>35</sup>. Yet these authors, with the somewhat later M. Porcius Cato and L. Calpurnius Piso<sup>36</sup>, while they differ as to the alleged year of the foundation of the city, all agree entirely in reporting the well-known legend of the twins, their supernatural origin, their miraculous preservation, and the rest. Nay, if the bronze wolf now in the Capitoline Museum at Rome, or a similar previous work<sup>37</sup>, was actually set up as *Liyy alleges*<sup>38</sup> by the Curule Aediles Cn. and Q. Ogulnius, this "saga" was already matter of popular belief in 296 B.C.

**The story of Aeneas.** Not quite so early a vogue can be claimed for the Roman sequel to the "tale of Troy divine," though it has perhaps filled more space, at least with poets, from Virgil up to his rudest predecessors. So in the *Bellum Punicum* of Naevius, who served in the first Punic War of which he wrote the account, dying B.C. 204<sup>39</sup>; and in the slightly later *Annales* of Ennius<sup>40</sup>, the story of Aeneas appears as current<sup>41</sup>. Among the prose writers, too, Fabius seems to have accepted generally the descent of the two Alban princes

Anchise (D. H. 1. 73. 3). 'Αρχιερεῦσι is not the word used elsewhere, by Dionysius, for the Pontiffs, but *ιεροφάνται* (see 2. 73). It is possible, therefore, that the latter part of the sentence as well as the former is an actual quotation from Polybius' 6th Book of which much, including his account of the religious institutions of Rome (see Polyb. 21. 10. 11), is unfortunately lost.

<sup>35</sup> D. H. 1. 6. 2, ὃν εἰσι πρεσβύτατοι Κόιντός τε Φάβιος καὶ Λεύκιος Κίγκιος, ἀμφότεροι κατὰ τοὺς Φοινικικοὺς ἀκμάσαντες πολέμους. τούτων δὲ τῶν ἀνδρῶν ἑκάτερος, οἷς μὲν αὐτὸς ἔργοις παρεγένετο, διὰ τὴν ἐμπειρίαν ἀκριβῶς ἀνέγραψε, τὰ δὲ ἀρχαῖα τὰ μετὰ τὴν κτίσιν τῆς πόλεως γενόμενα κεφαλαιωδῶς ἐπέδραμεν.

<sup>36</sup> D. H. 1. 79. 4.

<sup>37</sup> See Middleton, i. 245.

<sup>38</sup> Livy, 10. 23.

<sup>39</sup> Teuffel, i. 131, § 95. 4, 8.

<sup>40</sup> Finished 172 B.C. See A. G. 17. 21. 43.

<sup>41</sup> See Macrobius, 6. 2. 31, 32: Enni Rell. (L. Müller) xxi. &c.

from Aeneas<sup>42</sup>; Cato, a slightly different version from the Virgilian one, of the contest between the hero and his son against Turnus and Mezentius<sup>43</sup>; while in later, and one would have thought more critical days, Varro can still write *de familiis Trojanis*—patrician descendants of the original *Conquistadores*<sup>44</sup>.

In fact, from the beginning of the literary period onward, we find a fairly uniform version of the early "History" of Rome established, which is accepted, almost without remark, by all the prose writers whose works are preserved, in any extent, to us—from Sallust to Augustine—and in which the Trojan descent, and the subject-matter of the Aeneid generally stand on much the same footing as the narrative of the Regal period<sup>45</sup>.

**The obviously fictitious.** Sir G. C. Lewis, in his enquiry into the credibility of early Roman History, which must still be a leading authority on the subject, enters a caution against Niebuhr's arbitrary selection of what we are to keep and what to reject in these stories<sup>46</sup>. And yet there are certain broad distinctions which may, as it seems to me, be drawn with comparative certainty.

The whole of the connexion with Troy must surely be rejected as having no discernible foundation in reality and a very obvious one in fiction, while it runs counter to comparatively well ascertained facts both of Philology and Ethnology. Whoever may have been its Geoffrey of Monmouth—whether Polybius' *bête noire* Timaeus of Sicily or Cephalos of Gergithus or Callias of Syracuse, or, the most probable, Diocles of Peparethus<sup>47</sup>—it is obviously a Greek

<sup>42</sup> Plutarch, Romulus, c. 3.

<sup>43</sup> Servius ad Aen. 1. 267.

<sup>44</sup> Id. ad Aen. 5. 704.

<sup>45</sup> See Lewis, i. 75.

<sup>46</sup> Lewis, i. 437—440 : ii. 81, &c.

<sup>47</sup> D. H. 1. 67, 72, 74 : Polybius, Rell. xii. 4<sup>b</sup> : Plutarch, Romulus, 3, 8. As to Diocles, Mommsen, Forsch. ii. 279, n. 82, *contra* Lewis i. 408 and Müller, Festus, p. 268. See further, as to Hellanicus and Damastes, Lewis, i. 63, 314.

romance, a continuation of the Trojan story, in which we have, for hero, a survivor, originally under no very creditable circumstances, of his country's destruction, but afterwards improved into the excellent person depicted by Virgil. Neither must it be forgotten that the father of Roman History, Fabius, belonged to the mission sent to the great Greek oracle of Delphi, and wrote in Greek, presumably for Greek readers<sup>48</sup>.

The details of the Alban dynasty are satisfactorily shewn by Niebuhr and Mommsen to have originated in the work of Greek *littérateurs* belonging to the last half century B.C.<sup>49</sup> To the same source—*Graecia mendax*—we may perhaps refer the origin of stories about the Corinthian ancestry of the Tarquins<sup>50</sup>, the embassy sent to consult the laws of Solon<sup>51</sup>, or the Decemvirs' legislative assessor Hermodorus the Ephesian<sup>52</sup>.

**The possible amount of truth.** While, however, we must reject the obviously Greek romancing in these early stories, we may perhaps be allowed to recognise an Italian or national *residuum* of more genuine character<sup>53</sup>. Some features of the Romulian legend may really be disguised facts, preserved possibly by that supposed *ballad tradition*, of which Macaulay writes so eloquently in the Preface to his noble Poems; by those "ancestral lays" in which Dionysius tells us the story of the twins "is still sung"<sup>54</sup>. Yet Cicero had asked, years before, in Villon's pathetic strain, Where are

<sup>48</sup> Mommsen, *Forsch.* ii. 279; Teuffel, i. 169, § 116. 1.

<sup>49</sup> Mommsen, *Die Albanische Königstafel. Chron.* 156—159. Also *Forsch.* ii. 267, n. 61.

<sup>50</sup> Livy, i. 34: Pomponius, *Dig.* 1. 2. 2. &c.

<sup>51</sup> Livy, 3. 31.

<sup>52</sup> Pomponius, *Dig.* 1. 2. 2. 4; Pliny, *N. H.* 36. 25 gives Hermodorus the more probable character of a *commentator* on the XII. See Lewis, ii. 222, n. 170.

<sup>53</sup> See Lewis, i. 408.

<sup>54</sup> D. H. 1. 79, ἐν τοῖς πατρίοις ὕμνοις... ἔτι καὶ νῦν ᾄδεται. I of course agree with Lewis, i. 240, that the *poëmata* of chance, in Plutarch, *Romulus*, c. 8, are not poems.

they now, our old verses, chanted long ago, says Ennius, by Fauns and Bards, before anyone had climbed the peaks of the Muses or dared to open their gates<sup>55</sup>?

If Cicero speaks of the old ballads as gone, may it not be possible that the reference to them by Dionysius as *still* sung was not a vague flourish of his own but a statement of some much earlier writer, perhaps Fabius himself, thus indicating to us a true national origin for part of the legend<sup>56</sup>? Livius Andronicus was, it is true, a Greek importation, yet he invokes a genuine Italian muse—Camoena—with whom Greece had nothing to do<sup>57</sup>. The hymn of supplication, written when Hasdrubal was on the way to join his brother (207 B.C.) was surely in Latin, while the guild of poets established in honour of its author, whether under the auspices of the Etruscan Minerva or the Italian Camoenae, could scarcely avoid taking some note of old national lays<sup>58</sup>. Fragments of such lays might conceivably have survived to the Augustan age, and prompted Livy's glowing style. But I am disposed to give the credit rather to his own genius and to believe him to have drawn almost exclusively from the prosaic historians who preceded. None, certainly, of the same charm is perceptible in his contemporaries, Dionysius and Diodorus, who appear to have conscientiously availed themselves of all the historical information extant in his, and their, time.

Granted the possibility of ballad legend, how much of the matter thus handed down by old national tradition may be

<sup>55</sup> Mais où sont les neiges d'antan? Cf. Cicero, Brutus, 18. 71, Quid nostri veteres versus ubi sunt "quos olim Fauni Vatesque canebant cum neque musarum scopulos quisquam superarat," &c. See ib. 19. 76 and Orator 51. 171.

<sup>56</sup> *Contra* Lewis, note A, i. pp. 238, 9.

<sup>57</sup> See his translation of Odyssey .1. 1, Virum mihi Camena insece vorsutum, in A. G. 18. 9. 5. For the true spelling and derivation of Camena, see Corssen, Aus. i. 605.

<sup>58</sup> See Livy, 27. 37. For the aedis Minervae publice attributa in honorem Livi, Festus F. Scribas 333. For Camenarum aedes Pliny, N. H. 34. 19. For Collegium poetarum Val. Max. 3. 7. 11.

fact, how much, like the Greek stories, fiction? Confining myself, of course, to matters legal or constitutional, I venture here, with much deference, to follow a little in the track of Niebuhr, deprecated by Sir G. C. Lewis.

**Romulus and Alba.** The individual eponymous founder of the Stream-town<sup>59</sup> must go; but the special connexion, with this name, of particular national characteristics or institutions is an obvious recognition of very high antiquity; with which these might indeed be credited, as we shall hereafter see, on their own intrinsic account.

While, for instance, the full-grown constitution attributed to the founder can, of course, have had no reality in such primeval times; on the other hand, a rough military organisation by *hundreds* is no very incredible phenomenon in migratory occupations of territory already peopled by some aboriginal race.

The persistent *dualism* also, apparent in so many of the old Roman institutions, which appears to me to have been utilised, rather than invented, for the nascent Republic, can scarcely have been, as Pais regards it, a series of copies, by romancing historians, from some foreign model. It is far more intelligible as a fact, originating in a joint migration of two cognate tribes, which may be represented partly in the legend of the brothers, partly in the stories of Romulus and Tatius, &c. Nor, possibly, is the tradition of Alban descent without some foundation in truth, as indicating an overflow from the heights which were first occupied by the parent stock, and which long afterwards were still the centre, or at least still retained the central sanctuary, of the Latin League<sup>60</sup>. On all these points, however, and their possible

<sup>59</sup> The least unsatisfactory derivation of Roma. Corssen, *Beit.* 428: Curtius, 353.

<sup>60</sup> See Festus, F. 241, Praetor ad portam. Was this the *porta Ferentina*? See Plutarch, Romulus, c. 24, and the subject of *Ferentina* generally. According to Corssen (*Beit.* 174) Ferentum, Ferentinum is the "stronghold" (*Festung*).

illustration by a very remarkable parallel in our own early history, I hope to speak more fully hereafter.

**Numa, Tullus, Ancus and the Tarquins.** As to the personality of the three following kings (the supernatural being set aside) there is no such *à priori* reason, as in the case of Romulus, to dismiss them at once to the realm of fiction. I am obliged, however, on further consideration, to withdraw a suggestion previously made by me (E. R. L. 54) that they may actually have been chieftains of the Pomponii, Hostilii and Marcii who afterwards claimed them as ancestors<sup>61</sup>. The modern explanation of these heroes, which I am inclined with some qualifications to accept, is that they are, at least as to their second names, inventions of the period after 367 B.C. or even 300 B.C. (see below, p. 52) for the glorification of "arrived" plebeian families, at a time when the Pontifical board had become in great part plebeian. This was long ago suggested by Mommsen in the cases of the Hostilii, Marcii and Popilii<sup>62</sup>. The plebeian character of the *gens* Hostilia is not perhaps quite clear, and there are certainly very old legends connected with the name: Popilii and Marcii appear as Consuls shortly after the Licinian Rogations, and a Consular Marcius is one of the first four plebeian Pontiffs, in 300 B.C.<sup>63</sup> The attribution of Numa to the *gens* Pomponia is apparently a somewhat later invention. In these cases, and generally where a traditionally early achievement is connected with some name which occurs historically as plebeian, I am rather disposed to adopt the invention theory of Pais. It must certainly be admitted that a considerable number of families, set down as patrician, in Cohen and other very respectable authorities, appear to owe their alleged patriciate entirely to these early stories.

The name of *Numa*, to whom so much primeval legis-

<sup>61</sup> See Cohen, *Monnaies de la république Romaine*, Pomponia 2; Hostilia 2. 3; Marcia 18—20.

<sup>62</sup> Mommsen, *Forsch.* i. 104.

<sup>63</sup> Livy, 10. 9.



lation, and really primeval custom, was attributed, has been explained, now as the Judge or Prophet, now as the Distributor or Legislator<sup>64</sup>. His second name is derived by Corssen from the Sabellian word *pompe* five<sup>65</sup>, with which number the name of *Pontiff* has been recently connected by Pais. Into the derivation of certain *gentile* names from *numbers*, I can only enter elsewhere. But I entirely disbelieve any connexion of *Pontifex* with *five*, and only mention Corssen's derivation of Pompilius in order to call attention to the *racial* character of the name<sup>66</sup>, which points, with other facts, to the first quatrain of Kings as a significant artificial arrangement. For it is pretty clear that Romulus and Numa, Tullus and Ancus—the latter, as has been often remarked, an obvious doublet of the former pair—are intended for alternate Romans and Sabines. As to the relative antiquity of "Numa's" connexion with very ancient Roman ceremonies, and with the Greek-looking story of Egeria, I cannot speak. Both are as old as Ennius<sup>67</sup>, who wrote the part in question of his *Annales* probably before 196 B.C.<sup>68</sup>

The question whether *legislation*, in any sense, took place in the Regal period, and what import if any is to be given to the assignment of this or that institution to the individual Kings will be treated hereafter. I may complete here what I have to say about their personality. The four first must be regarded as entirely fictitious. The Tarquinian family, on the other hand, and their rule, are admitted by a large proportion of modern authorities, and in my opinion with justice, to be mainly historical. The scheme and general

<sup>64</sup> Corssen, i. 439: Curtius, 313.

<sup>65</sup> Corssen, i. 116.

<sup>66</sup> We may remark here Livy's note (41. 4) on one of the probably more historical Popilii who distinguishes himself against the Histri in 178 B.C. Sabello cognomen erat.

<sup>67</sup> See Varro, L. L. 7. 42—45.

<sup>68</sup> Tenffel, i. 101. 3. For the rationalistic explanation of the beautiful myth see D. H. 2. 61, 68 and Livy, 1. 19. For a more material, in fact unpleasantly *medical*, version of Egeria, Festus, P. s.v. 77.

policy attributed to Servius is perfectly intelligible, both in motive and method<sup>69</sup>. Nor can I see that the truth of his career, as a whole, is much discredited by the allegation of supernatural birth, &c., common enough in genuine heroes of legendary history. Neither again is the development of his military organisation into a tyranny, nor the resulting revolution, either improbable or without parallel.

**Length of the reigns.** Of course little store can be set by the Holyrood series of seven Kings' statues in the Capitol, standing at the time of the murder of Ti. Gracchus<sup>70</sup>. There seems to have been considerable doubt as to which was which, in the days of Pliny<sup>71</sup>; at some time, however—though not, as Livy assumes, in B.C. 365!—these statues bore a subscription of the number of years attributed to each reign<sup>72</sup>. The practical impossibility of the total, as compared with the most extreme cases of *hereditary* monarchy in History, has been often noted<sup>73</sup>. This feature in the story, which may very probably be regarded as the work of the official restorers directly after the Gallic conflagration (see above, p. 40), has been variously explained. Mommsen<sup>74</sup> makes the prodigious seven reigns to be seven "generations" of  $33\frac{1}{3}$ , the total "rounded off" to 240. Puchta<sup>75</sup> thinks that the restorers of chronology, finding consular record for 120 years of Republic, *doubled* this for the Regal period, adding four for *interregna*. I need not dwell on other ideas, more or less fanciful. For myself, I have always been most struck with the strangely close approximation of the years, between the foundation and destruction of the city, to the days in a solar year, and have

<sup>69</sup> On a possibly early authority for the Servian system, see below, p. 58.

<sup>70</sup> Appian, B. C. i. 16.

<sup>71</sup> N. H. 33. l. 4.

<sup>72</sup> Livy, 6. 41, Omitto Licinium Sextiumque, quorum annos in perpetua potestate, tanquam regum in Capitolio, numeratis.

<sup>73</sup> See *inter alia*, Clark, E. R. L. n. p. 54.

<sup>74</sup> Hist. i. 480, see Chronologie, 137.

<sup>75</sup> Cursus, i. 117 (§ 36).

been inclined thus to explain the 364 years<sup>76</sup>. We must at present regard the 244 years of the seven reigns as an arbitrary estimate, based on grounds which we have not the means of ascertaining, and not of the slightest practical importance.

The poetical stories attributed to the Regal period have only a value for the present enquiry where they bear upon early law or legal principle. These do certainly, as compared with the Aenean and Silvian legends, "smack of the soil," and may once have formed the subjects of popular ballad, as held by Niebuhr and Macaulay<sup>77</sup>. The legal part would naturally be framed by the makers in accordance partly with the practice of their own time, partly with what was still remembered of an earlier age. There is, of course, very little weight in the reference to this or that king's reign; still, some general facts in the development of legal practice or constitutional principle may perhaps be traced, though interwoven with a story entirely fictitious.

Thus the tale of the Horatii and Curiatii must, as a narrative of fact, be at once relegated to the region of poetry, from the insuperable improbabilities which it contains. It seems, in truth, a compound of the defence of the bridge—which may be a true story, and certainly connects itself naturally with the *Horatia pila*—of certain very ancient rites belonging to the Horatian gens, and of certain family names occurring in that and the gens *Curiatia*, which are really explicable on other and homelier grounds<sup>78</sup>. But it contains, in the trial of Horatius, our earliest instance, accredited by an ancient formula, of Public Wrong treated as an offence against the community rather than against

<sup>76</sup> See, however, as to the solar year of the Roman Republic, Mommsen, *Hist.* i. 489 and *Chron.* 34, n. 41.

<sup>77</sup> Above, p. 43. See too Lewis, i. 216—218.

<sup>78</sup> Livy, i. 26; D. H. 3. 21, 22; Festus, *Sororium tigillum*, F. 297; Burn, 194; Lewis, i. 456, 7.

heaven; it specifies in that formula the kind of sentence which would naturally come into existence under a tyranny—perhaps more particularly an Etruscan tyranny—and it dates the beginning or the survival, under that tyranny itself, of the Appeal to the assembled citizens, which was so remarkable a feature in the Public Law of the Republic, and possibly the cause of so remarkably extended a scope in the domain of Private Remedies<sup>79</sup>.

In conclusion, whatever legal principles or formulae are attributed by Roman authority to the Regal period may be taken generally as prior to the Twelve Tables, and, when attributed to Romulus and Numa, as probably very ancient. But they must be judged by internal character and form rather than by any such attributions, which are undoubtedly the work of Republican Pontiffs, and probably not earlier than the influx of a plebeian element into the sacred College at the beginning of the third century B.C. I pass now to times in which a more authentic order of such events as bear on legal development may, I think, be recognised.

**Early Republican History.** In the restored history of the early Republican period we find not only a positive chronology fixed by the official lists of annual magistrates, but also an amount of detail which, as is remarked by Lewis, while strangely omitting some important points, in the main would not discredit Hansard or the Annual Register<sup>80</sup>. The probable source of this modern amplification will be pointed out hereafter (below, pp. 56, 59). The list of Consulates and the connexion of certain events with this or that consular year, while it cannot be regarded as an exact record, may not improbably preserve to us, with general correctness, that *sequence* of legal or political movements which is most important for my present subject.

<sup>79</sup> For a fuller treatment of this subject see Perduellio in the following part of this work.

<sup>80</sup> Lewis, ii. 136.

How soon and by what means the record was originally restored we can only guess. At some date after the foundation of the temple of Juno Moneta (344 B.C.), possibly at that very time, a list of yearly magistrates had been drawn up, in the shape of the *libri lintei*, which appear, though occasionally questioned, to have been a recognised early authority on that subject, but perhaps only on that<sup>81</sup>.

It is not improbable that the number of years from the establishment of the Republic may have been preserved through the conflagration (above, p. 36). But as to the individual magistrates for each year and the events connected with their names, except during the space of actual memory immediately preceding the catastrophe, the restored list and *Annales* must have been a somewhat arbitrary Pontifical re-writing, based probably in the main upon such family histories as were to hand, with the supplement or check of general popular tradition.

**Part played by family tradition.** This element assumes naturally, for the early Republic, a much greater comparative importance than during the Regal period. While overshadowed by the despotism of the Tarquin family, in which that period certainly ended, the other nobility come little into notice<sup>82</sup>, and would indeed have little record to preserve either of achievement or office. But, from the establishment of the Republic and its yearly change of dual magistrates, we have, of course, an increasing roll of more or less distinguished individuals, with something to be recorded in family archives or at least to be retained in family memory—it might be

<sup>81</sup> See, for the foundation of the temple, Livy, 7. 28; for the *libri lintei* 4. 7, 13, 20, 23. Juno Moneta was originally the Goddess of Memory. Her connexion with Money is merely accidental, from the locality of the first Mint in her temple. See Mommsen, Chron. 209, 210, also Curtius, 312. Corssen, however (i. 488), makes *Moneta* a direct reference to the token or stamp.

<sup>82</sup> Cicero, de rep. 2. 18. 33, *Temporum illorum tantum fere regum inlustrata sunt nomina.*

simply their year's tenure of office, but it might also be some remarkable event with which they were concerned in that year. Such events would be, with the ordinary run of *bellicosæ Quirites*, battles and sieges; we are rather interested in the peaceable changes at home, which at first are mainly connected with the struggle between the Orders. This, though at first sight purely a matter of Public Law, has no slight bearing from time to time upon the development of Private; and a somewhat debated point, as to early plebeian magistracies has, it seems to me, a good deal to do with the possibilities of a fairly truthful record having been preserved of early legal changes.

As regards the *authors* of the revised list of officers after the conflagration, and whatever annals accompanied it, there is no question of their Order and natural tendency. The Pontificate was not open to plebeians till 300 B.C. Nor was the Consulship necessarily and permanently open to the lower Order till 367 B.C. But, long before this, besides the somewhat mythical Junius of the revolution, several individual cases of Consuls are recorded in the *Fasti* from families historically plebeian, a very conspicuous one being that of Sp. Cassius in 502 B.C. And the Military Tribunate, instituted as a compromise<sup>83</sup>, was certainly held by a plebeian as early as 400<sup>84</sup>; possibly, though the cases are questionable, in 444 and 422<sup>85</sup>. If these plebeian magistracies are genuine, there were occasional though rare opportunities, not merely, at the time, for a plebeian's share in administration and legislation, but also for a plebeian's entry on the public annals, and preservation in his family record, of events in that famous struggle which it is now rather the fashion to represent as mere fanciful anticipation of events actually occurring much later.

The view of Mommsen is that such early plebeian Consuls as Sp. Cassius are sham patricians, smuggled into the list in

<sup>83</sup> Livy, 4. 6.

<sup>84</sup> Livy, 5. 12.

<sup>85</sup> See Mommsen, *Forsch.* i. 95.

later times from old plebeian families who had then come to the front<sup>86</sup>. My own suggestion, if I may venture to differ from so great an authority, is that a representation of *both* Orders in the government was probably intended at the beginning of the Republic, and for some time occasionally carried out. The list of early Consulships was most likely (above, p. 51) settled before any plebeian influence came into the Pontifical body of recorders, but still by patricians who knew that plebeian tenure of the magistracy was not absolutely impossible in the earlier times. The insertion of the actual names I take to be, even if arbitrary, an indication of some contemporary legal political movement, as in the case of the recurring Valerii and Horatii, who are often considered such damning evidence of forged history.

There is nothing, surely, intrinsically incredible in the fact that certain of the old *noblesse* should have enjoyed a sort of temporary monopoly of high office, nor that certain fixed political traits may have shewn themselves in Roman families, as they have in English ones. The last point was perhaps too confidently pressed by Dr Arnold, who partook largely of Mommsen's inspiring modernity, and had strong English instances before his own eyes. And it must be admitted that the repeated enactments *in simili materia*, attributed to members of some particular Roman house, do sometimes look very like doublets, or rather anticipations, of later and more historical fact. This need not, however, discredit the earlier events *in toto*, which is one of the sweeping conclusions of Pais. The error arising from family tradition, or from the traditional character of a family, may not improbably lie rather in the attribution of some movement or change to a particular, perhaps fictitious, author, than in the fact, more important to us, that such movement or change did take place about the time in question. In writing this

<sup>86</sup> Mommsen, *Forsch.* i. 111.

last paragraph I had chiefly in view the several *leges Valeriae*, but there are plenty of other instances not confined to patrician houses, e.g. acts attributed to early representatives of the *gentes Publilia, Duillia, Maenia*, or of the more questionable *Icilia*.

The practice of dating a law in some particular year merely by a namesake Consulship or Tribunate is now much less in vogue than it used to be. In fact, at the present day this sort of evidence seems to me to be somewhat undervalued, at least for the later period—e.g. after 344 B.C.—when the magisterial lists may be taken as fairly historical. In the earlier days of a quasi-legendary Consulate and Tribunate, particularly as to the time before the burning of the city, when the lists, &c., must have had to be restored from tradition as much as from record, the same evidence can only be taken as indirectly proving the order and time in and about which any particular legal events took place. For in this period it would no doubt be due to popular belief, coupled with family tradition, that some member of the well-known *gens* has office attributed to him at the time when a reform in the main historical was generally believed to have been carried<sup>87</sup>.

**Comparative truth of result.** According then to the view here taken, it is to a combination of general tradition and individual family record—both probably fairly true in the main—that we may refer most part of the official restoration of early Republican history and the scanty notices of legal development therein preserved; all being, it is true, until after 300 B.C., under patrician custody and liable to patrician revision. Whenever made, this official record did not escape subsequent manipulation (see below, § 3, p. 73); but, with regard to the main features of legal history, I do not see

<sup>87</sup> See the attempt to account for Varro's Dictatorship of Poetelius Visolus, Mommsen, *Forsch.* ii. 245.



sufficient reason to question the general truth and approximately historical order, even of the account which has come down to modern times.

To mention a few instances. The remarkable dual magistracy is more explicable, to my mind, in connexion with the story of a Junius (really plebeian) as one of the first pair, than by the modern theory of a far-sighted provision of checks in the way of *appellatio* or *intercessio*. But, as this reading between the lines is mainly conjectural, I would defer the subject till I come to treat it in detail.

The account, on the other hand, of an early Republican establishment of *provocatio*, and its attribution to a supposed member of the noble family historically connected with the re-establishment of the same right in later times, are what we should expect from patrician record of a general national measure, necessitated by the tyranny of the Tarquins. The statements as to the introduction of the plebeian Tribunate, with its strange anarchic powers, lasting to the latest, and its archaic sanctions linking it with the earliest times, are also exactly in the tone, the best testimony for their truth, of grudging concession by a reluctant aristocracy. Nor is there any want of intrinsic probability in the various stages reported of the subsequent struggle between the Orders, several of which have a direct bearing upon Private Law.

Of course the whole of the detail, picturesque or wearisome according as our historian is a Livy or a Dionysius, with most of the individual names of the actors concerned, will probably come from a later period than the early family records or *Annales*, which *might* have a contemporary or paulo-post contemporary authenticity. Such brief memoranda, if any, as diverged from the more congenial subject of military exploit, would give little but the style of an officer created, and the subject-matter affected, by an act of legislation, or otherwise. While sufficient perhaps to connect *leges*

or legal movements with certain names, and to give them a rough historical order, they scarcely can have contained any statement of *objects* or *effects*, which are often, even where we seem to have the *ipsissima verba* of an enactment, from the brevity of ancient legislation, by no means easy to divine. The flesh and blood to this skeleton, so far as it was furnished by the early historians who were the authorities of our authorities, and not entirely the invention of the latter, must have come from a later form of the *privata monumenta*, to which Livy refers as existing before, and to some extent preserved after, the Gallic conflagration<sup>88</sup>, but which must have grown into a more imposing and less trustworthy character before they came into the hands of a Fabius Pictor or Cincius Alimentus.

I shall conclude with a few words on the different forms of these *monumenta*, their particular lines of exaggeration or invention, and the probabilities of their recording, with some approach to accuracy, that class of events with which my present enquiry is specially concerned.

**Family Commentarii.** Private records having a considerable similarity to the earliest public form of general history at Rome, i.e. the *Annales*, have been recognised, with an unusual amount of faith, by Lewis, as existing for some part, if not the whole, of the Republican period after the destruction of the city. He refers to a supposed practice, obtaining amongst the magistrates in general, of taking away at the close of their year of office, and preserving in their own family repositories, some record of the more important "laws and acts of the State," made for or by themselves, distinct from the annals of the Pontiffs<sup>89</sup>.

Accumulations of such family memoirs would of course

<sup>88</sup> Above, § 1, n. 16.

<sup>89</sup> Lewis, ii. 136, 7. "*Annales magistratuum*" occurs in Livy, 9. 18, but is objected to by Mommsen, Chron. 208, n. 394, as (?) unintelligible.

be liable to subsequent colouring, which evidently lay for the most part in the appropriation or invention of *warlike* exploit. But there is no reason why they might not also comprehend, in the more intellectual families, political movements and crises connected with legal reform, in which, though no doubt the family hero would be exalted and his opponents decried, the words or import of the legal change would be at any rate briefly indicated.

There does not, however, appear to me to be any very direct evidence of this as a *general* practice among the early magistrates, of whom I am principally speaking, except perhaps in the case of the *census*—one of peculiar interest to us, because we may possibly recognise here a real historical basis for our accounts of the old Servian register, with some points of which early Roman Property Law is closely connected.

A Roman who had held the office of *Censor* does appear to have made a point of leaving full memoranda to his descendants, as a guide, no doubt, for somewhat difficult duties, to any subsequent member of the family attaining the same office. Several of these records, which were regarded by Dionysius as of very high authority, came down from quite early times; one, in particular, bearing date "under the Consulship of L. Valerius Potitus and Titus [*sic*] Manlius Capitolinus in the 119th year after the expulsion of the kings"—392 B.C., two years before the city was burnt—had apparently been actually inspected by him<sup>90</sup>.

This very definitely dated record seems to have suffered revision, if not "restoration," after the conflagration: for the variant *Titus* for *Marcus*, in the name of the hero of the Capitol, most probably has reference to the dropping of the latter *praenomen* after his execution<sup>91</sup>. Yet there is

<sup>90</sup> D. H. 1. 74.

<sup>91</sup> See below, p. 62. According to Mommsen (*Forsch.* ii. 179, n. 52) it is a simple blunder.

nothing impossible in the original having been one of the private literary *monumenta* which Livy merely represents as "for the most part" destroyed. The Manlii need not have been the only family living on the Capitol<sup>92</sup>, which was never taken. It was probably indeed to another race more connected, by old reputation, with legal matters, that this note or memoir belonged. L. Papirius Cursor appears as Censor for the year before (393), in the *Fasti Capitolini*, and it is of a Senator from that family that the story is told about his offended dignity and haughty resentment causing the massacre of the whole body by the Gauls<sup>93</sup>.

If the *provenance* here suggested for that story, in connexion with the early record quoted by Dionysius, be correct, it seems possible that the *ensorii commentarii* may have occasionally extended to some entry of remarkable events, besides the mere dated register and notes of practice. The last, however, would appear to have been the subject of the *ensoriae tabulae* and the *commentarii consulares* quoted by Varro for the ancient forms of summons to the *lustrum* or *comitia centuriata*<sup>94</sup>. The Censorship, as a separate office, was not instituted till 443<sup>95</sup>; but the duties of registration, &c. are represented as regularly performed by the Consuls (at first called Praetors) from 508 downwards<sup>96</sup>. By any of these an account, even extending to previous dealing with the same business, might well be preserved, for the same reason as, in later times, by the Censors proper: so that there is a possibility of the Servian system, as reported to us, being, in its main features, matter of historical record, and not a mere fabrication evolved out of later practice.

<sup>92</sup> The *cognomen* was undoubtedly due merely to local residence. See Mommsen, *Forsch.* ii. 184; Lewis, ii. 365, n. 14.

<sup>93</sup> Livy, 5. 41.

<sup>94</sup> Varro, *L. L.* 6. 86—88. See, however, Teuffel, i. § 78.

<sup>95</sup> Livy, 4. 8; D. H. 11. 68.

<sup>96</sup> Livy, 3. 3, 22, 24; D. H. 5. 20, 75; 6. 96; 9. 36.

**Funeral orations, pedigrees, &c.** Such notes, if any, of the events of his office, as were left to his descendants by Censor or Consul were, we may believe, in the old time, after some allowance made for *amour propre*, of much the same brevity and general truth as the public yearly records made by the Pontiffs. The supplementing of such memoirs, and their expansion into something like a continuous narrative, was probably due, in the first instance, to Funeral Orations and the careful preparation of *Encomia* on a deceased Roman of family. These led ultimately to Family Remembrancers in regular book form, such as the *liber commentarius de familia Porcia* to which Aulus Gellius represents himself as referring, besides their *laudationes funebres*<sup>97</sup>.

The earliest cases of Funeral Oration that I can find recorded are those of L. Caecilius Metellus<sup>98</sup>, who held office in the year 224 B.C.<sup>99</sup>, and of M. Claudius Marcellus, who was killed in an imprudent *reconnaissance* against Hannibal, B.C. 208<sup>100</sup>: but there seems no reason to question a somewhat greater antiquity for the practice, which Polybius<sup>101</sup> describes as well established in his own time (c. 150 B.C.). Stories of Orations in the first Consulate or the Regal period we may set down as mythical<sup>102</sup>. Polybius also records the use of those *likenesses* to which Livy repeatedly refers, bearing their superscription of honours or exploits. The last usage we know to have been as old as the time of Ap. Claudius Cæcus, who indeed gave *his* ancestry the greater glory and more enduring record of a monument in a temple—that of his patroness Bellona<sup>103</sup>.

<sup>97</sup> A. G. 13. 20. 17.

<sup>98</sup> Pliny, N. H. 7. 45. 139.

<sup>99</sup> Dictator Comit. hab. causa Fasti Capitolini.

<sup>100</sup> Livy, 27. 27.

<sup>101</sup> Polybius, 6. 53, 54.

<sup>102</sup> D. H. 5. 17 and Lewis, i. 182. See, however, *valeant quantum valent*, Livy, 2. 47 for 480 B.C.; 5. 50 for 390 B.C.

<sup>103</sup> Compare Appian's vow in Livy, 10. 19 with Pliny, 35. 3. 12. The whole story in Livy about the quarrel with Volumnius (Appian's old colleague

Of these earlier Orations we cannot judge from any direct specimen, as the only ones which we have are on two ladies who died in the first century of our era, and who are merely celebrated for their private or domestic virtues<sup>104</sup>. According to Polybius, the speaker, after recounting the deeds of the deceased, went through those of his ancestry, beginning with the founder of the race<sup>105</sup>, real or imaginary. So Caesar, in his oration on his Aunt Julia, is represented as tracing her descent through the Marcii Reges to Ancus, through the Julii to Venus<sup>106</sup>. I have mentioned above (p. 46) the probable *invention* of Ancus, in the interest of the Marcii, who were historically a plebeian *gens*, even as to the family which bore the striking *cognomen* Rex<sup>107</sup>. However this *cognomen* is to be explained<sup>108</sup> it goes far to account for the existence of Ancus Marcius the king. We see well, in this case of Caesar, how those fables of divine or heroic origin could arise, which we have to begin by setting aside when we try to arrive at the true origin of the old *gentes* as indicated by their names.

**Coriolanus and Manlius.** *À propos* of the Marcii, a very curious case of family hero-worship occurs to me, in which, whatever our admiration for the artistic result, we cannot regard the main figure as genuinely historical. In the beautiful story of Coriolanus—so human, so un-Roman, so full of irreconcilable difficulties—the selection of the in-

11 years before) is doubtless part of the strange anti-Claudian twist (see below, p. 65). The date given in Pliny (u.c. 259) is an obvious confusion of Caecus with his ancestor Regillensis.

<sup>104</sup> Laudatio Turiae and Murtiae, Bruns, i. 282—287.

<sup>105</sup> I cannot but think this is the real meaning of the passage ἀρχαί... ἀπὸ τοῦ προγεγεσκότου. For a translation of the passage as it stands, with the reading τῶν παρόντων, see Lewis, i. 181.

<sup>106</sup> Suetonius Caesar, c. 6.

<sup>107</sup> Mommsen, Forsch. i. 104, n. 73.

<sup>108</sup> May it possibly have come from a unique plebeian *Rex Sacrorum*, who appears and disappears (like Melchisedec) in Livy, 27. 6, 210 B.C.? See, however, Mommsen on this *Rex Sacrorum*, Forsch. i. 84, n. 25.

dividual hero must, according to Mommsen, be regarded as one of the retrospective ennoblings of a distinguished plebeian family: for the only other patrician Marcii are shewn by him to be fabulous characters like Ancus the King<sup>109</sup>. But, as the same author well points out<sup>110</sup>, the story also contains a practical glorification of the plebeian Order, which here attains its first right of positive interference in matter of general national concern. The particular gain was the establishment of State Trial, on a capital charge, before an assembly predominantly, nay, if our accounts can be relied upon, exclusively plebeian. The temporary existence of such trials, somewhat resembling Bills of Attainder, and their abolition by the Decemviral legislation, is apparently a historical fact. Whatever actual sacrifice, then, of some vigorous patrician champion was actually attempted or achieved, in this manner, must belong to the pre-Decemviral period, and come from some popular tradition: while the ennobled Marcius of the story, "his triumphs and his wrongs, his vengeance and his mercy" which "live in our camp-fire songs" down even to Dionysius' time<sup>111</sup>, is according to Mommsen a poetical invention no earlier than the second half of the third century, though not much later<sup>112</sup>. One version of it, we may remember, was known, if not more than one, to Fabius Pictor<sup>113</sup>, born about 254 B.C.

He who seeks, says Mommsen, in such stories as that of the first Consul Brutus, of Sp. Cassius and of Coriolanus, a so-called kernel of History will find the nut deaf. I have presumed to think differently in both the other cases (above, p. 53). So in the story of Caius Marcius it is possible that we read the actual history of a popular champion won or convinced over to the other side, and sacrificed to the

<sup>109</sup> Mommsen, *Forsch.* i. 104.

<sup>110</sup> *Id.*, *Forsch.* ii. 150, 147.

<sup>111</sup> D. H. 8. 62. See, however, above, p. 44.

<sup>112</sup> Mommsen, *Forsch.* ii. 151, n. 77.

<sup>113</sup> *Livy*, 2. 40. See too D. H. 7. 71.

vengeance of his own, which was the fate of our Strafford, and might, but for the *opportunitas mortis*, have been that of France's Mirabeau. The Greek features in the story, its humanity and modernity, Mommsen is doubtless right in referring to at least the beginning of the Roman literary period<sup>114</sup>.

In the history of Marcus Manlius, on the other hand, while the preceding feat of the Capitol's defence may possibly be explained away by reference to a residential *cognomen*, we have obviously, in the sequel, a true story of the radical aristocrat destroyed by his own patrician order<sup>115</sup>. The conflicting accounts of this hero's end point to the wavering character of mere popular tradition. They lack a unifying family record, which was scarcely likely to exist in the case of a member so completely disowned by his own patrician race that none was henceforth to bear his name<sup>116</sup>.

**Livy, &c. on the falsification of History.** It is to the Funeral Orations, and to the inscriptions under the busts of ancestors, that Livy himself directly attributes the falsification of History. The case in point is of no importance to my present enquiry, the question being whether the credit of a campaign against the Samnites, B.C. 322, was due to a Cornelius as Dictator or a Fabius as Consul. But Livy speaks generally of the time as one for which there was no contemporary writer to be trusted extant, while each family endeavoured to appropriate to itself, by deceptive falsehood, the credit of great exploits performed or high office borne<sup>117</sup>. In a similar strain Cicero alludes to the

<sup>114</sup> Mommsen, *Forsch.* ii. 144—149.

<sup>115</sup> On *Capitolinus* above, n. 91. On the story generally Lewis, ii. 365—372; Mommsen, *Forsch.* ii. 181—183, &c.

<sup>116</sup> Festus P. Manlium 125, Manliae 151.

<sup>117</sup> Livy, 8. 40, *vitiatam memoriam funebribus laudibus reor falsisque imaginum titulis, dum familiae ad se quaeque famam rerum gestarum*



family histories, as the source of forged triumphs, multiplied consulships, false pedigrees and fictitious transitions of patricians to the plebs, devised in order to give plebeians a reputed connexion with the great families<sup>118</sup>. The last charge may possibly have arisen from the one or two genuine early *plebeian* consulships to which I have referred above, p. 53. As to the alleged object, I may here cite an interesting quotation of Plutarch's. It comes from a writer on chronology named Clodius, as to whose date and identity we are much in the dark, but who most probably wrote about 90 B.C. and may possibly have been attached to the older patrician Claudii, to whose family his later spelling of the gentile name seems to have been specially appropriated<sup>119</sup>.

"The ancient inscriptions (?)," says this "certain Clodius," "disappeared in the Gallic troubles of the city, and those now extant were composed without reference to truth, by persons wishful to curry favour with men who thrust themselves into the first *gentes* and most illustrious houses, from stocks nowise related"<sup>120</sup>."

honorumque fallenti mendacio trahunt. inde certe et singulorum gesta et publica monumenta rerum confusa. nec quisquam aequalis temporibus illis scriptor extat, quo satis certo auctore stetur.

<sup>118</sup> Cicero, Brutus, 16. 62, quamquam his laudationibus historia rerum nostrarum est facta mendosior. multa enim scripta sunt in eis, quae facta non sunt, falsi triumphi, plures consulatus, genera etiam falsa et ad plebem transitiones, quum homines humiliores in alienum eiusdem nominis infunderentur genus.

<sup>119</sup> I cannot place much weight on the spelling, which varies in Plutarch even as to the same branch. As to the author's identity see Lewis, i. 152, and Teuffel, i. 228, § 155. 1. The latter on the whole takes Plutarch's Clodius to have been Claudius Quadrigarius, who was writing as late as 87 B.C.

<sup>120</sup> Plutarch, Numa 15 Κλώδιος τις ἐν ἐλέγχῳ χρόνων (οὕτω γὰρ πως ἐπιγέγραπται τὸ βιβλίον) ἰσχυρίζεται τὰς μὲν ἀρχαίας ἐκεῖνας ἀναγραφὰς ἐν τοῖς Κελτικοῖς πάθεσι τῆς πόλεως ἠφανίσθαι τὰς δὲ νῦν φαινομένας οὐκ ἀληθῶς συγκείσθαι δι' ἀνδρῶν χαριζομένων τισὶν εἰς τὰ πρῶτα γένη καὶ τοὺς ἐπιφανεστάτους ὁκοῦς ἐξ οὗ προσηγόντων εἰσβιαζομένους. Lewis l.c. calls these ἀναγραφαί

The Romans, like ourselves, had their "first de la Jones," and the "*Graeculus esuriens*" corresponded to our amateur Herald's Offices, ready to provide arms and ancestors to the Roman *nouveau riche*. Nor were the more respectable historians proper free from family partiality, if we are to accept Livy's judgment—of Licinius Macer, for instance, in a narrative relating to the first plebeian Consul of that name, 361 B.C.<sup>121</sup>: though our historian is considered by Mommsen to have been indebted to the same questionable authority for the strange portraiture which has so long passed for history in the case of the two great law-making Claudii<sup>122</sup>.

**The patrician Claudii of History.** I may, perhaps, here be pardoned some slight digression, or rather anticipation, on the subject of men who had so much to do with the development of Roman Law. In the Claudian *gens*, as in several others, there was a patrician and a plebeian branch, and it is not impossible that there was no love lost between the two. The true political career of the great patrician Appii—the Decemvir and Caecus—has been set beyond a doubt by Mommsen<sup>123</sup>. Now the combination of patrician arrogance with radical politics is, as every one knows, quite possible. But the meaning and bearing of the measures carried by these two great men becomes almost unintelligible, in the accounts uniformly given of them by the Augustan and post-Augustan historians, unless we look to the obvious results, instead of to these conventional and recurring tirades.

On the story of Virginia I shall have to dwell elsewhere; what I would here suggest is, that, in the "historical" generally "registers," but, as *στέμματα* are referred to just before, I think something more definite is intended.

<sup>121</sup> Livy, 7. 9, quæsitæ ea propriæ familiæ laus leviorẽ auctorem Licinium facit.

<sup>122</sup> Mommsen, Forsch. i. 315.

<sup>123</sup> Mommsen, Forsch. i., Die patricischen Claudier.

treatment of the patrician Claudii we ought, perhaps, to take into account, not only the particular anti-aristocratic tendency of such a writer as Licinius Macer<sup>124</sup>, but also the jealousy or rivalry of a branch of the same *gens*, which, however really distinguished, *was* plebeian, and to which the reigning Imperial family, or its heirs apparent, belonged. It is possible that a hint of some such rivalry may be perceptible in the complaint of Plutarch's Clodius<sup>125</sup>.

**Conclusion.** In discussing the secondary authorities for the earlier history of Roman Law, I have been obliged briefly to enquire from what ultimate sources Roman history in general would appear to have been made up, down to what I have taken as the beginning of the literary period, i.e. about 200 B.C. Those sources I take to be as follows:

For the alleged 240 years of Royalty and the first 120 years of the Republic, Pontifical memoirs and annals, restored after the Gallic conflagration, containing a certain amount of genuine tradition and family record, mixed, in our own immediate authorities, with a much larger amount of later invention.

From after the destruction of the city, or at least from about the middle of the 4th century B.C., the same memoirs coupled with a fairly accurate yearly record of public officers and probably of measures connected with them, though subject, both then and later, to confusion or obscurity from the increasingly fictitious character of family memoirs.

With regard to the events more particularly belonging to my present subject—reforms or institutions bearing on Private Law, and on Constitutional Law so far as the two are unavoidably connected—I am rather less inclined to share

<sup>124</sup> See Teuffel, i. 232 (§ 156. 5), and the quotations from Cicero.

<sup>125</sup> Mommsen, however (Forsch. ii. 283—287), finds a deeper root for jealousy of the old Claudii, in the supposed desire of Fabius Pictor to exalt his own and depreciate a rival house, transmitted through Diodorus to Augustan times.

the modern scepticism than I am in the case of external matters, such as conquests or military exploits, which panegyrist specially tend to appropriate or invent for their patrons' families. Our fragmentary remains bearing on the legal principles and practice of the earlier Regal period may *prima facie* be supposed to come from a time before the Twelve Tables, but must be judged and placed by intrinsic character, which is, on the whole, in favour of their high antiquity. The regulations of the Servian system, upon which, in my view, a good deal of the later Private Law depends, are, I think, satisfactorily explicable as part of a great military organisation under the historical Tarquinian dynasty. And, as a record of the original system, it is just possible that special memoranda or early copies of such memoranda were actually preserved into the literary period.

On the various legal movements in the earlier part of the Republic and generally down to the literary period, although exact year dates cannot be regarded as trustworthy, there is not, as it seems to me, any strong reason to question the reputed order of events in general. The difficulty lies, particularly with such old documents as the *leges regiae* and the fragments of the Twelve Tables, in determining the exact meaning of what is not only quoted (often for some non-legal purpose) in the briefest and scantiest way, but is evidently not too intelligible to our classical authorities themselves. See further the conclusion of the next section.

### § 3. SECONDARY SOURCES IN THE LITERARY PERIOD.

#### 1. HISTORIANS.

Secondary sources in the literary period. 1. Historians. Juristic: Ser. Fabius Pictor, Aelius Stilo, Cincius, p. 67. Pomponius, Gaius, 70. General: Fabius Pictor, Cincius Alimentus, 71. Cato, Polybius, &c., 72. The younger Annalists, Fasti Capitolini, 73. Livy, Dionysius, Diodorus, 74. *Lacunae* and stopgaps, 75. Conclusion as to pre-Augustan History, 76. Post-Augustan Historians: Appian, Tacitus, Suetonius, Dio, 80. *Historiae Augustae Scriptores*, 81.

In treating of the secondary sources of Roman Private Law and its history, it was found necessary to devote a considerable amount of space to the probable means of information, from the preliterate period, enjoyed by our own immediate authorities and their predecessors of the literary period, put roughly as beginning about 200 B.C. From that time onwards we have, besides the occasional occurrence of original documents, secondary evidence which has been roughly classified above under the heads of (1) Historians; (2) Poets, business men and other writers of general literature; (3) Antiquaries; (4) Jurists. Most of our information comes immediately from writers of our own era or very little before it, but it is necessary to devote a brief notice to their predecessors, particularly perhaps to those of the first division.

1. **Historians.** With these must be classed a small number of **Jurists**. Though the history of law is not a subject which usually occurs to early professional writers, we might, while making all due allowance for the fragmentary

character of ancient literature in general, expect more help from Roman lawyers than we actually get. A few, however, of the Jurists in the literary period wrote, as may be seen by the titles and fragments of their works, from a semi-historical point of view, and some information is accordingly to be derived from them, though only, as will be seen, at second or third hand, on the earlier state of legal affairs at Rome.

Such was **Ser. Fabius Pictor**, a writer who appears from Cicero's account of him to have combined the study of law and antiquity<sup>1</sup>. He wrote a commentary, old in Varro's time, on sacerdotal law<sup>2</sup>, containing *inter alia* the curious abstentions and precautions incumbent on the Flamen Dialis<sup>3</sup>, and the formula for "taking" a virgin to be a priestess of Vesta<sup>4</sup>. This work was used, and probably re-edited, by later antiquarians<sup>5</sup>. Its author was evidently sometimes confused with Quintus Fabius Pictor the historian<sup>6</sup>; but the latter wrote in Greek; whereas Servius is clearly quoted in original Latin (with a Saturnian ring in it), and is moreover dated by Cicero as contemporary, and apparently collaborating, with Ser. Fulvius who was Consul in 135 B.C.<sup>7</sup>

Such too was **L. Aelius Stilo Praeconinus**, the friend of the poet Lucilius<sup>8</sup>, the teacher of Varro, by whom he was afterwards edited<sup>9</sup>. His lectures were attended by Cicero

<sup>1</sup> Cicero, Brutus, 21. 81.

<sup>2</sup> Nonius, Salis, p. 223. See too Polybrum, 544.

<sup>3</sup> A. G. 10. 15. 1—17.

<sup>4</sup> A. G. 1. 12. 14, In libro primo Fabii Pictoris, quae verba pontificem maximum dicere oporteat, cum virginem capiat, scriptum est. Ea verba haec sunt: Sacerdotem Vestalem, quae sacra faciat, quae ius siet sacerdotem Vestalem facere pro populo Romano Quiritibus, uti quae optima lege fuit, ita te, Amata, capio.

<sup>5</sup> Veranius in Augustus' time. See Macrobius, 3. 2. 3.

<sup>6</sup> See Nonius, Picumnus, p. 518.

<sup>7</sup> Il. cc. from Nonius and Cicero.

<sup>8</sup> Auctor ad Heren. 4. 12. 18; A. G. 16. 8. 2.

<sup>9</sup> Cicero, Brutus, 56. 205.

as a youth<sup>10</sup>: he is probably the source of most of the older law preserved in Festus, and, in particular, has had attributed to him<sup>11</sup> great part of the matter commonly supposed to come from Sex. Aelius the author of the *Tripertita*<sup>12</sup>. L. Aelius wrote a Commentary on the Salian hymns<sup>13</sup>: and, on the whole, was apparently regarded by subsequent writers rather as a "grammarian" or philologer than as a historian of Roman law<sup>14</sup>. He must have lived down to 90 B.C. or later, to have been a teacher of Cicero's. Teuffel makes him to have been born about 154.

If the Cincius repeatedly quoted in Festus were identical with the annalist L. Cincius Alimentus (Praetor, 210 B.C.), his testimony on the early relations of the Latins to Rome, on the older *comitia*, on the consular power, &c.<sup>15</sup>, as that of a man living comparatively near to the times of which we have so little contemporary record, and at the same time endowed with some talent for antiquarian research, would be of almost unique importance. But the Cincius of Festus would seem to have been a later writer, probably contemporary with Livy<sup>16</sup>, so that, as far as regards personal knowledge or acquaintance with current tradition of past institutions, he does not stand so high as Aelius Stilo.

The remains of these and similar authors are scanty and come to us sometimes, as in the case of the more illustrious "grammarian" M. Verrius Flaccus (see below, § 5, p. 90), at second (Festus) or third (Paulus) hand. They have been mentioned here as Jurist-historians, but they perhaps belong rather to the antiquarian class of secondary Sources<sup>17</sup>, on which I have to speak hereafter.

<sup>10</sup> Ib. 207.

<sup>11</sup> Schöll, 26—30.

<sup>12</sup> Above, § 1, p. 22.

<sup>13</sup> Cicero, *de legg.*, 2. 23. 59; Festus, F. Sonticum, p. 290.

<sup>14</sup> See Varro, *L. L.* 7. 2; also *apud* A. G. 1. 18; Suetonius, *Gramm.* 2, 3.

<sup>15</sup> Festus, F. 241. Praetor *ad portam*: Patricios.

<sup>16</sup> See Teuffel, i. 172 (§ 117. 2, 4), and Mommsen, *Chron.* 315.

<sup>17</sup> See Krüger, 92, n. 2.

This is not the case with the important extract from the *Enchiridium* of **Sex. Pomponius**—probably only the introduction to that work<sup>18</sup>—which comes to us as *Digest* 1. 2. 2. Here we have a sketch of the history of Roman Law down to the time of Hadrian (117—138 A.D.), under whom it was written. The record of the two or three hundred years before the writer's time is perhaps fairly to be relied upon as to facts, though the causes and objects alleged may sometimes be questioned. The earlier part of the sketch, drawn probably from lost writings of Varro<sup>19</sup>, is also of very considerable value, which is, however, diminished not only by its general looseness of statement, but occasionally by undoubted inaccuracy both as to dates and persons. We have also clearly to discount, in this writer, a tendency, more excusable in general historians, to read the practice and forms of his own time into the scanty records of a remote age<sup>20</sup>. As Pomponius, moreover, from the extreme brevity and comprehensiveness of his sketch, gives none of the detail of his antiquarian authorities, the value of his testimony, on points treated also by the general historians, is not very much greater than what may be gathered, in a more diffuse form, from them. But his narrative has the merit of continuity, and it occasionally supplements *lacunae* elsewhere. In what a fragmentary condition Roman general history has come down to us, and what questionable material has to be employed for filling the gaps, will be familiar to any one who has pieced the narrative of Livy

<sup>18</sup> Krüger, 69.

<sup>19</sup> Sanio, *Varroniana*, &c. 134, 208; see also Krüger, 69, nn. 2, 3, and Teuffel, i. § 166. 6, d, p. 261.

<sup>20</sup> See e.g. positive statements of the regular enactment of *leges* by the kings and *Tribunus Celerum*, §§ 2, 3, 15. The point taken, on the other hand, by Virginius in § 24 contains, no doubt, a true reference to ancient practice; though to make this Virginius' main motive shews a pedantry or obtuseness to ordinary human feeling eminently Roman.



with such stuff—valuable and even indispensable though it is under the circumstances—as is contained in Freinsheim's Supplement (see below, p. 76).

With these few exceptions, almost all the juristic writings which have come down to us, in any amount, were written by and for men in practice; and, as the older law had been to a great extent superseded by what *we* may call Equitable modifications, their references to it are but occasional and incomplete. The theory, too, of a Law of Nature, which entered so largely into the conception of a *jus gentium*, was perhaps not without influence upon the statements by later Jurists even of the *jus civile*. It certainly seems sometimes to have been found more easy and interesting to connect old national law with supposed original principles of "Nature," than with actual but obscure customs and records.

To this deficiency in our juristic authorities **Gaius** is so far an exception that he usually prefixes to his notices of present practice a brief reference to the older law. But his treatment is incidentally, not primarily, historical; the dates of important laws, named by him from their proposers, are indeterminable, except by somewhat dubious external evidence (e.g. *lex Pinaria, Silia, Aebutia*); and, on some rather crucial points, for our purpose, the palimpsest MS. of the Institutes is unfortunately obliterated or illegible. We have no substantial remains of any other Jurist who may have treated Roman Law from a distinctly historical point of view.

**General Historians.** We may now pass, therefore, to the historians proper, who have come down to us from the literary period, and what we can learn of their predecessors, on whose probable sources again, in the preliterate period, I have spoken in § 2. As to these predecessors themselves, from whom we have very little, few words will suffice.

**Q. Fabius Pictor** probably began to write his *ιστορία* about 200 B.C.<sup>21</sup> **L. Cincius Alimentus**, who also wrote in Greek and is generally regarded as slightly junior to Fabius, was Praetor in 210 B.C.<sup>22</sup> These were evidently regarded by other historians as authoritative witnesses for at least the military operations of their own time. They gave, however, also, as we have seen (§ 2, p. 41), a brief version of the earlier "History," on which Cincius, though shewing perhaps somewhat greater power of critical discernment, agreed with his better known contemporary in accepting the foundation legend, and probably did not differ materially from him as to earlier history in general.

**M. Porcius Cato**, b. 234, d. 149 B.C., is of more importance to us as a contemporary witness, in his speeches and business works, to the legal practice of his time (see below, § 4, p. 84), than as author of the first Roman historical work in Latin prose. The first three books of the *Origines* would appear to have dealt with the early legendary history of Rome and other Italian cities: the remaining four dealt with the wars of the author's own time or the preceding generation<sup>23</sup>. What few fragments of this work bear upon early law come to us through the antiquaries.

As belonging to about the same time may be mentioned **Polybius**, the first, according to some, of the *pragmatic* historians, who treat events not merely in order of time but as matter of reasoned cause and effect. He wrote his *ιστορίαι* about 140 B.C., and is a valuable contemporary authority for what information he gives us as to the constitution and military arrangements of Rome in the second century before our era. But we have little or nothing from him on Private Law or the development of Roman Law in general.

<sup>21</sup> Teuffel, i. 170 (§ 116. 5).

<sup>22</sup> Livy, 26. 23. On Cincius generally, Teuffel, i. 171 (§ 117).

<sup>23</sup> Nepos, Cato, 3. 3. See Teuffel, i. 174 (§ 120. 1), and 343 (§ 198. 5).

After these leading names, it is unnecessary to give individual accounts of a series of minor historians or annalists writing in the 150 years before our era; whose names may be read in Teuffel's account of the literature of the 6th and 7th centuries (of the City), and upon whose various authorities and credibility scattered notices occur throughout the work of Sir G. C. Lewis, but who do not particularly concern us. They appear to have copied largely from one another<sup>24</sup>; they were evidently obnoxious to the disturbing influences of a family partiality or a dependant's subservience; and they probably gave only a slight and perfunctory attention to law, particularly Private Law, as compared with military exploit or action in some great political crisis. But the main point, after all, is that we only have them in the scantiest quotations, and those with little bearing, or none at all, on law or its development.

**The younger Annalists. *Fasti Capitolini*.** To this intermediate period, however, probably belong, as is shewn by Mommsen in his chapter *Fabius und Diodor*<sup>25</sup>, many alterations of older and presumably more genuine records by "the younger annalists," mainly for family glorification, but sometimes with a view to the removal of supposed inconsistencies. These amendments extended, not infrequently, to the list of magistrates itself, a settled version of which was ultimately inscribed on the walls of the *Regia* about 34 B.C.<sup>26</sup> The fragments of this inscription constitute the basis of our *Fasti Capitolini*, so called from the Museum where they are kept. The recension of the *Annales Maximii* (above, § 2, p. 33) by Publius Scaevola dates from some hundred years earlier, his Pontificate coming most probably after his Consulship, which was in 133 B.C. Of this final

<sup>24</sup> See e.g. D. H. 1. 79; Livy, 25. 39, &c.

<sup>25</sup> Mommsen, *Forsch.* ii. 220—290, particularly 230, 241, 261.

<sup>26</sup> Teuffel, i. 107 (§ 75. 2). See, however, Ch. Hülsen in *Hermes*, 24. 185.

form of the *Annales* we know, unfortunately, as little as of their remote original or the restored series after the Gallic conflagration. They evidently contained gossiping stories enough, e.g. the explanation of the removal of the statue of Horatius Cocles<sup>27</sup>, and *may* have incorporated or prefixed the whole history of the kings, though Cicero's evidence is not quite clear as to this<sup>28</sup>. These official last editions had, of course, a high authority, but by no means to the exclusion, with historiographers, of older and possibly more trustworthy records<sup>29</sup>.

It is upon **Livy** and **Dionysius** that we have mainly to rely for the evidence, from general history, on Roman Private Law and its development. Both wrote after the battle of Actium<sup>30</sup>, B.C. 31; so that they had a host of manipulators of history between them and the original documents, or even the historians of the early literary period. Both draw to a certain extent from original documents or what were regarded as such: both occasionally consulted the old historians: but they more often adopt the views of copyists and second-hand authorities. Their contemporary **Diodorus** is, I think, clearly shewn by Mommsen<sup>31</sup> to have availed himself, in general, of earlier and better records, and in particular of the older authority of Fabius Pictor, than either of the other two: but the individual points, on which he may be taken to correct their narrative, do not seem to me to have any considerable bearing on questions of Private Law or its history.

I must except, however, from this general unimportance

<sup>27</sup> A. G. 4. 5.

<sup>28</sup> In de rep. 1. 16. 25 it is only the eclipse of 404 B.C., which is definitely referred to the *Annales*. The calculation back to that in which "Romulus was lost" apparently comes from Varro or his learned friend Tarutius. See Cicero, de div. 2. 47. 98; Plutarch, Romulus, c. 12; and Mommsen, Chron. 146, n. 278.

<sup>29</sup> See Lewis, i. 173, 174.

<sup>30</sup> Livy, 1. 19; D. H. 1. 7.

<sup>31</sup> See Mommsen, Forsch. ii. 240, 290.

of Diodorus, one most valuable note on the true policy and political character of Ap. Claudius Caecus, which is connected, though somewhat indirectly, with an important development in Roman legal practice. The passage is cited at length, and its bearing shewn, in a note to Mommsen's valuable article on the patrician Claudii<sup>32</sup>. Beyond this, I have not found Diodorus to come much into my present enquiry. On later authorities, supplementary to Livy and Dionysius, see below.

**Lacunae and stopgaps.** The condition, in which our two main authorities have come down to modern times, leaves us unfortunately, on several epoch-making occasions, to very inferior guidance. **Dionysius'** history, the 20 Books of which extended to the beginning of the first Punic War, has not been preserved in entirety, farther than 443 B.C. (11. 63). Of the remaining Books we have a few, but not unimportant, fragments, the last dateable one (20. 8) belonging to 271 B.C.

Out of **Livy's** 140 Books, coming down to B.C. 6, we have the first decade, ending 293 B.C., and Books 21—45, B.C. 218—167. For the rest there are the *Summaries* (*Periochae*) often attributed to Florus, but probably compiled in the 4th century A.D. from some fuller abridgement, which was apparently known to Martial<sup>33</sup>. These Summaries no doubt give the contents of the lost Books, but with such extreme brevity that they sometimes almost cause more difficulty than they remove. I need only refer to the tantalising oracularity of the notes on the Hortensian law (Per. 11), on the appointment of a second Praetor (Per. 19), and on the reforms of Flaminius (Per. 20).

The *Epitoma* of **Florus** himself, who wrote under Hadrian,

<sup>32</sup> Diodorus, 20. 36. See Mommsen, *Forsch.* i. 307, n. 41. Also above, § 2, p. 66.

<sup>33</sup> *Epigr.* 14. 190; see Teuffel, i. § 256. 10, p. 521.

adds nothing to the knowledge which we require. It is a fairly well-written string of national commonplaces; but the author only purports to treat of the Wars, and, with the exception of the usual stories about the kings, and skeleton summaries of the "seditions" in the early Republican and the Gracchan period, he keeps strictly to his design<sup>34</sup>.

The *Periochae*, on the other hand, in spite of their brevity, are among the best of the scattered pieces of evidence with which we have to fill up the *lacunae* in Livy and Dionysius. These stopgaps come partly from the post-Augustan historians, of whom I have to speak below, but more from general literature of the moralising and anecdotal character. The slight credit due to many of them is obvious enough, if we look through Freinsheim's Supplement of the lost books of Livy, printed in Drakenborch's great edition. I may remark that I have found no book so useful for forming an independent judgement, based on original authorities, as this Supplement, supplemented of course, in its turn, by modern editions of the authors quoted, and by the discoveries of later archaeology.

**Conclusion as to pre-Augustan History.** \* Of course when historians are speaking of the law *of their own time* their testimony assumes a higher order of value, approximating, in proportion to the research, intelligence and explicitness of the writers, to the character of a primary source (see below, p. 80). Most of the later historians of whom I shall have to speak presently, are sometimes referred to as supplementing the pre-Augustan history of law by their statements of the past; sometimes, for the Augustan and post-Augustan period, as supplementing our principal authority, the Jurists, by their evidence of the law existing in their own time.

For my purpose it is convenient to draw a line between

<sup>34</sup> See, on Florus, Teuffel, ii. § 348, p. 202.

the latter period, for which we have contemporary juristic record, though, it is true, somewhat fragmentary, and the former, for which we have little or none. I will therefore briefly state here the principal conclusions arrived at as to the truth, or approximation to truth, of pre-Augustan legal history at Rome.

For the time before the Republic we can trust *no dates*, and must rely both for our estimate of authenticity and of historical sequence upon intrinsic probability, apparent connexion with institutions extant in historical times, and such obviously ancient fragments of terms and formulae as have been preserved to us—which last we owe, as will be seen, rather to antiquaries than historians (see below, § 5, p. 88).

For the Republican period, certainly till within a few years of the conflagration, probably for a considerable part of the 50 years following (i.e. down to 344 B.C.), the list of magistrates, and the connected *Annales*, must be regarded as a reconstruction; but a reconstruction in accordance with general tradition, aided by family memories, as to the order of events, and the connexion of any particular family with a particular measure or class of measures.

I therefore see no insuperable difficulty, from mere remoteness of period, in placing, for instance, Gaius' *lex Pinaria*, as Mommsen places it, *about* the date of 472 B.C., or in admitting a *lex Aternia Tarpeia* of 454<sup>35</sup>.

After 344 B.C. the dates, where we have them, may for our purpose be fairly well trusted; such corruption as has crept into the record, from family memoirs, being apparently not so much directed to matters of legal movement and reform as to military exploit. But, unfortunately, in many important instances, the proposer who gives his name to a particular measure, if, as often in matters of reform, a

<sup>35</sup> See Mommsen, Chron. 252, n. 46.

tribune, will not belong to the class of officers whose years of office are recorded. This leaves us in doubt as to the exact dates, e.g. of such important *leges* as the *Aquila* and *Aebutia*. The *lex Poetelia*, on the other hand, can be determined with certainty at 326 or 313 B.C. We may pass, however, to more general considerations than that of exact date.

I have mentioned above (p. 70) a tendency of our authorities to attribute the principles and often the actual procedure of the writer's time to men of ages before. Its effects are seen not merely in comparatively immaterial descriptive embellishments, such as give his charm to Livy and his prosiness to Dionysius, but in express anticipations of late Republican law. It is mainly, however, though not exclusively, in the Regal and early Republican period that we find these obvious anachronisms occurring—not only in our historians proper, but in quasi-juristic writers like Cicero, and in Jurist-historians such as Pomponius.

The carelessness or want of critical judgement<sup>36</sup> to which these not very important slips are due, leaves us, however, occasionally in some perplexity when we come to much later times and more historical stages of Roman legal development. An instance is that great turning-point in the history of contract law just referred to—the passing of the *lex Poetelia*. Here, and in other similar cases, it is not so much with regard to *date*, as to what is called in German phraseology the *pragmatic* treatment of events—with regard, that is, to their logical connexion, their motives or causes, and their effects, that our historians are often inadequate and sometimes misleading.

When therefore, as often, there is reason to believe that we have *not* had reported to us the full and exact terms of

<sup>36</sup> The charge brought by Polybius, 3. 8, 9, against Fabius *à propos* of the causes alleged by him for the second Punic War.



a statute, a constitutional compact or an alleged rule of practice, we must sometimes feel ourselves obliged rather to *read between the lines*, than literally to accept a Roman historian's paraphrase, or his statement of objects and results. Some liberty of this kind certainly seems required in dealing with Livy's brief narrative on the *lex Poetelia*<sup>37</sup>: also in attempting to reconcile or account for the Valerio-Horatian and Publilian *leges* as preceding the Hortensian; where we have *three* statements, all in the nature apparently of paraphrase or "general effect," to deal with. I have spoken elsewhere (pp. 64, 75) of a very decided reading between the lines which is required by the current estimate of the character and reforms of Ap. Claudius Caecus: I have myself little doubt that the same freedom of judgment is required for those of C. Flaminius, the illfated scapegoat of Thrasymene.

Another unfortunate characteristic, for our purpose, of the Roman historians, is one common enough among all early writers of the kind—a comparative disregard for what is unimpressive and domestic, particularly for such unobtrusive changes as apparently went for so much in the very automatic growth of Roman Private Law. When, for instance, we come to the epoch of that law's first great development—starting from 200 or 180 B.C.—it is not merely the fragmentary character of our main historical authorities, but their brevity or silence, of which we have to complain.

Thus, the appointment of a second Praetor may or may not have been treated, in Livy's lost Book 19, with the oracular abruptness of the *Periocha*. But, on the assignment, at first occasional, then permanent, of a separate tribunal to parties of different nationality; on the gradual growth of a Law Merchant; and on the final passing of the

<sup>37</sup> Livy, 8. 28.

*lex Aebutia*, all of which most probably fall within the space covered by Books 34—45, there does not seem to have been a word from Livy. For these matters, and for the gradual crystallizing of the Edict, until it began to be fixed in 67 B.C.—in fact for the private legal history of the last century and a half of the Republic—we have to rely mainly upon the evidence of general literature (see § 4), eked out by stray notes from the post-Augustan historians, with whom I shall conclude this section.

**Post-Augustan Historians.** Under this head I include, of course, writers after Augustus who dealt, *inter alia*, with history *before* his or their own time, but am more particularly concerned with the chroniclers of contemporary events. The two classes of evidence furnished by these historians have been described above (p. 76): I shall here only mention the principal names, with the kind of information for which each is more particularly valuable.

**Appian**, though apparently only a compiler from earlier historians, is undoubtedly, for the hundred years covered by his *Civil Wars* (Ἑμφύλια), i.e. 133—35 B.C., in the absence of other historians, an authority of unique value. His references to the law of that period bear evidence at once to carefulness of statement and intelligent comparison with that of his own time<sup>38</sup>. He wrote probably c. 150 A.D.

On the other hand **Tacitus**, writing about 98—117 A.D., and **Suetonius**, about 120, are more important as witnesses to contemporary than recorders of earlier law. It may seem strange to place a comparatively slight value, for our purpose, upon these great names. Yet only very scanty notices of current law are vouchsafed by them—the one being more interested in political moralising and a somewhat morbid psychology, the other in the scandals for which he shews such an incomprehensible credulity. As to the past,

<sup>38</sup> See A. 100 and B. 29 on the Tribunicial power, &c.

Tacitus would seem to have relied, for law and history, largely upon the works of recent predecessors, with but little research into original authorities<sup>39</sup>. Suetonius shews perhaps more industry in this direction, but less discrimination, than his great contemporary. With both, the references to early history, except in the most general terms, are comparatively rare and quite incidental.

**Dio Cassius**, born about 153, living 229 A.D., is used for both the purposes above referred to. For the older Roman History he seems to have drawn from much the same sources as Livy and Dionysius; and, in Niebuhr's view, with greater accuracy and discrimination<sup>40</sup>. But the first 35 books of his *Historiae* are lost, except a few fragments, and our only continuous representative of them is in three books (7—9) of the *Epitome of Histories* by Zonaras, a Byzantine compiler of the 12th century. To these sources, however, a few facts of real importance, as to the early history of Roman Law, are due. From about 69 B.C. to Dio's second consulship under Alex. Severus, A.D. 229, we have his original work, or a more authoritative abridgement than that of Zonaras above mentioned, by Xiphilinus in the 11th century. The particular value of Dio, for our purpose, of course, increases as he approaches his own time, which coincides with the last period of development in Roman Private Law, at the hands of the licenced jurists and principal writers of the Digest.

Finally, I may add that heterogeneous body of generally very inferior authors known as the ***Historiae Augustae Scriptores***, ranging from about 284 to 306 A.D.<sup>41</sup> Still, even the worst of these writers, in point whether of critical enquiry or literary merit, will occasionally preserve the sole record of some contemporary fact or phase bearing on the history of law. Any references by them to previous history are quite worthless.

<sup>39</sup> See Teuffel, ii. § 333. 11, p. 159.

<sup>40</sup> See Lewis, i. 74, n. 11, and p. 123.

<sup>41</sup> See Teuffel, ii. § 392.

## § 4. SECONDARY SOURCES IN THE LITERARY PERIOD.

### 2. GENERAL LITERATURE.

Poets. Plautus, Ennius, Satirists, 82. Ovid, Virgil, Humorists, 83. Men of business. Cato, Varro, Cicero, 84. Pliny, Quintilian, 85. Agrimensores, 86. Biographers, &c. Valerius Maximus, Plutarch, 86. Pliny the Elder, 87.

The authors placed under this heading are, for our purpose, valued like contemporary historians, rather for their testimony (the more incidental the better) to the law of their own time than for statements of what has gone before. The rough subdivision given in a previous section (§ 3, p. 67) was mainly suggested by the individual authorities as they successively occurred to my notice in the present enquiry. It will be obvious that I have been obliged to confine myself to a few chief representatives.

**Poets.** First in time among these authorities come dramatists of the earlier literary period, so soon at least as they left mere translation of Greek works, and adopted the more genial line of national comedy, into which the everyday recourse to law must from time to time enter.

I refer particularly to **Plautus**, the only dramatist whose plays (dating from 204 to 184 B.C.) have come down to us *in extenso*, and are at the same time of that truly national character and *verve* which we miss in the elegant "semi-Menander" Terence. The value of this author's testimony is, I think, put too low by Girard<sup>1</sup>. The plots are no doubt

<sup>1</sup> Manuel, 259, 260. See too Krüger, 102.

Greek, and the scenes are not laid at Rome; but the legal references must surely have been—like Shakespeare's in the *Comedy of Errors* and the *Midsummer Night's Dream*, &c.—to the procedure and magistracy with which the audience were familiar. Costa's *Diritto* contains a valuable collection of the passages in question.

A little information on contemporary practice is also to be gathered from the fragments of **Ennius**, 239—169 B.C. (see L. Müller's edition), and from the still scantier remains (mostly coming to us in quotations by antiquaries) from the comedians other than **Plautus**, or the satirists, down to the end of the Republic. When we come to the Empire, under which so many works of the poets have reached our hands in a tolerably complete form, it is to this last class that we owe almost all the contributions of any value to our knowledge of Roman Law, from Imperial poets. The **Fasti** of **Ovid** does indeed contain a certain amount of information on contemporary law; but, for any evidence as to the past, he may almost be disregarded, taking, as he necessarily must do, a patriotic or picturesque view of Old Rome rather than troubling himself about a critical analysis of popularly accepted "History." The same remark applies even more strongly to **Virgil**.

**Horace**, **Juvenal**, **Persius** and **Martial** on the other hand, to mention specimens of the humorist or later satirist class, are valuable sources for supplementing the information which we begin to get from the jurists.

I may add that, with some of the authors at present under consideration, an ancient commentator, however inappreciative or crotchety, will often be more useful, for our purpose, than the poetical text which he illustrates or paraphrases. I have specially in my mind **Servius** and **Porphyrio**, the commentators on **Virgil** and **Horace**: to the former of whom we owe great part of what we know on the sacral and

quasi-sacral law of the earliest Roman times; to the latter, most valuable connecting links in our reconstruction of the Decemviral Civil Procedure. These writers, however, belong properly to the class of antiquarians.

**Men of business.** Under this head **M. Porcius Cato** ("Cato the Censor," "Cato Major"), who died at the age of 86 in 149 B.C., affords us valuable contemporary evidence, though not very great in amount, as to the current Law of Contract, in his Manual on Agriculture. Most of the passages of importance, mainly about sales and leases, are cited at length in Bruns' Fontes.

**Varro's** three books *Rerum rusticarum* give us somewhat the same sort of information from about 100 years later, 37 B.C.<sup>2</sup>: but his more important contributions towards our knowledge belong to the antiquarian class (below, § 5, p. 89).

Of course the principal representative of prose writers is **Cicero**, who combines, or affects to combine, the characters of jurist, antiquary and historian. I venture to place him, for our present purpose, rather in the category of man of business.

Cicero is, according to Krüger<sup>3</sup>, the prose writer who has furnished the greatest wealth of materials to the historian of law. As to quantity, this is undoubtedly true: and the use of Cicero to the student of Roman Law has been, within the last year or two, immensely increased by the valuable works of Greenidge and Roby. Yet, with all Lewis' censure of Niebuhr, for his criticism of Cicero, before my eyes<sup>4</sup>, I must say that, in my own field of enquiry, I have found the great advocate's contributions of very varied and, in some cases, of very slight value. What little independent information, for instance, has reached us, from him, on the earlier Roman Law, seems to my judgement especially untrustworthy. The

<sup>2</sup> Toufflet, i. 263 (§ 168). See Varro, R. R. 1. 1. 1.

<sup>3</sup> Krüger, 108.

<sup>4</sup> Lewis, i. 181.

imitations of the antique, given in his *de legibus*, are, from their avowed admixture of the ideal<sup>5</sup>, not to be taken as any evidence of actual Roman Law, old or new. The *de republica* also has far too much of the optimism of our own Blackstone to make it a trusty guide for the obscure period to which almost all of the work that has come down to us relates.

In the philosophical works, where Cicero does touch on Jurisprudence, we never lose sight of the advocate<sup>6</sup>; any more than we do in the Orations, of which, it must be remembered, there are but few on Private Law<sup>7</sup>. In fact we can scarcely ever feel on quite safe ground, except where the speaker is evidently giving the exact words of some statute, edict or formula. These are, of course, when we get them, most valuable; as also is a good deal of the law cited, not for forensic purposes, in the *Topica*; although this last is by no means made more clear, from its peculiar employment, as an illustration of rhetorical or logical processes. Some indication of the resulting obscurity, or vagueness, may be found in the need, at any rate the existence, of Boethius' Commentary (see below, § 5, p. 96).

On the other hand, the plain business statements and directions in Cicero's admirable letters, 68—43 B.C., furnish us with much really valuable knowledge of contemporary Private Law. To the same class of evidence belongs the information, unfortunately but scanty, which we get from the letters of the younger Pliny, written 97—109 A.D. A little earlier, ? 95 A.D.<sup>8</sup>, was published the *Institutio Oratoria* of Quintilian, himself a practitioner, which contains valuable but only occasional references to practice.

<sup>5</sup> Cicero, *de legg.*, 3. 16. 37.

<sup>6</sup> See Teuffel's good remarks, i. § 185, p. 310.

<sup>7</sup> See Roby's very apposite quotations prefixed to his Appendix on the four principal ones.

<sup>8</sup> Teuffel, ii. § 325. 2, 6, pp. 131, 132.

**Agrimensores.** A few semi-professional writers, approximating but not exactly belonging to the jurist class, may be mentioned here—the Agrimensores, sometimes called *Gromatici* from the *groma* (? γρόμων) or *square* used in their mensuration<sup>9</sup>. These are writers of the Empire, beginning under Domitian (d. 96 A.D.) with **Sex. Julius Frontinus**, who is followed by less important commentators down at least to the time of Trajan. They supply evidence, primarily, of a branch of contemporary Land Law; but their definitions and explanations often remount to a much earlier period, and this gives us information similar to that derived from the antiquaries, which is often not to be found elsewhere. Most of what is important in these authors is quoted by Bruns in his Part ii. "Scriptores."

Amongst other writers of general literature who have contributed to our knowledge of law and legal history, may be specially mentioned biographers and anecdotists—and, as representatives of the class, **Valerius Maximus** and **Plutarch**. The former dedicated his *Facta dictaque memabilia* to Tiberius, who died 37 A.D.: the latter was made Procurator of Greece in his old age by Hadrian, A.D. 120<sup>10</sup>. We may probably date the *Lives* (which came after the *Quaestiones*) about 110.

Plutarch's *Quaestiones Romanae* (αἰτίαι Ῥωμαϊκαί) are distinctly antiquarian, and will be noticed under that head. Amongst his *Lives*, several of the older ones contain the same curiously explicit statements with respect to Ancient Law (and direct legislation) which we find in Livy and Dionysius. Useful, no doubt, or interesting, as supplementing the latter, they must still be taken with the same caution, and estimated on the same principles, as was suggested in the previous section (see § 3, p. 77).

As Plutarch's subjects come nearer to historical times,

<sup>9</sup> See Festus, P. 96, Groma.

<sup>10</sup> Clinton, F. R. i. 107.



and ultimately to his own, the occasional notices of law or legal change approximate, of course, more nearly to trustworthiness. But biographers in general, like all writers of monographs, are less valuable as authorities, than those who have the consistency of a continuous narrative to keep up, which operates as a considerable check upon easy-going stories and attributions.

The two authors above mentioned, who are among the best specimens of their class, seem, as to all events before their own time, to have drawn rather from historians immediately preceding themselves than from original sources; and they are accordingly mainly useful as representatives of the lost portions of better works which they have epitomised or abstracted. But of the carelessness with which this was done we have numerous instances, e.g. Plutarch's "Tarquinius the son of Demaratus," compared with his probable authority Livy; and the obvious blunders frequently made by Valerius Maximus, who drew mainly from the same source<sup>11</sup>.

It is mainly as an anecdotist that we have to regard the elder Pliny, the author of that most interesting and unscientific work the *Naturalis Historia*, which was finished in 77 A.D. but retouched and enlarged up to the author's death in the eruption of Vesuvius 79. On Pliny's credulity and want of critical discrimination enough is generally said<sup>12</sup>; but he certainly gives the impression of quoting correctly from that enormous number of authorities enumerated in his first book. His contributions, however, to the knowledge and history of law are not very numerous, and refer, I think, mainly to the early semi-fabulous part.

<sup>11</sup> Plutarch, Poplicola, 14, cf. Livy, i. 34. See too Teuffel, i. § 279. 3, p. 20.

<sup>12</sup> See e.g. Teuffel, ii. § 313. 3, p. 99.

## § 5. SECONDARY SOURCES IN THE LITERARY PERIOD.

### 3. ANTIQUARIES.

Antiquaries or "Grammarians." Aelius Stilo, Cato, Varro, 88. Verrius Flaccus, Festus, Paulus Diaconus, 90. Asconius and Pseudo-Asconius, 92. Probus, Plutarch's *Quaestiones*, Aulus Gellius, 93. Nonius Marcellus, Servius, 94. Macrobius, Priscian, 95. Boethius, Isidore, 96.

The third, but by no means the least important of our secondary sources consists of the antiquaries and "grammarians" of the literary period. The probable authority for our remnants of the *Tripertita* (see § 3, p. 68), Aelius Stilo, is mentioned by Suetonius as belonging to the latter class<sup>1</sup>; and we find, throughout, that the term *grammarian* indicates the functions of archaeologist and philologer quite as much as those which we should more naturally connect with it<sup>2</sup>.

It is upon such authors, as a matter of fact, that we have to rely almost exclusively for genuine fragments of the earliest law of Rome. They differ from lawyers proper, in preferring the subject of antiquated to that of extant practice; and from historians, in being more actuated by curiosity than by sentiment. They are therefore more likely to preserve an ancient relic intact than to misrepresent it by reference to current usage. They will not ignore what is homely and quaint in order to make a picturesque story, or to glorify a noble family. And their researches are proportionately more valuable to the historian of nascent law.

<sup>1</sup> Suetonius, *de gramm. et rhet.*, 2.

<sup>2</sup> See Teuffel on Stilo, i. § 148, p. 216.

An advantage, and a warning, for our use of this source, lies in the fact that, in the case of words and phrases, which were obsolete in the Roman literary period, *we* are aided by the entirely modern science of Comparative Philology; while, with the ancients, the false derivations and spurious antiques, which this knowledge enables us to detect, undoubtedly led to much erroneous speculation and possibly to some garbling of facts.

From **L. Aelius Stilo**, of whom enough has been said elsewhere, we have no direct remains. **M. Porcius Cato**, too, though obviously dealing, in his *Origines* (§ 3, p. 72), with much archaeological or quasi-historical matter, is only known to us, in that province, at second hand. His Manual on Agriculture has been mentioned above (§ 4, p. 84).

**M. Terentius Varro**, 116—27 B.C., was a Pompeian, taken into favour, after surrender (46 B.C.), by Caesar, and thenceforward devoting his life to study<sup>3</sup>. His proscription under the second Triumvirate, his great age, and the voluminousness of his works, appear in a quotation by Aulus Gellius<sup>4</sup>, from a fanciful lost work of his on "the Sevens" (*Hebdomades*). It is the extant part of his work *de lingua Latina* which is most cited as an authority on Roman Law: this, being dedicated and sent to Cicero, was necessarily completed before the latter's death, 43 B.C.<sup>5</sup> On his *libri rerum rusticarum* of 37 B.C., see above, p. 84. He died, according to Jerome<sup>6</sup>, in 28.

He was a pupil of Aelius Stilo, who transmitted to Varro the results of his own research, these being evidently much augmented by the pupil<sup>7</sup>. He went to what was probably

<sup>3</sup> Cicero, Epp. ad Fam., 9. 5, 6; Suetonius, Caesar, 44.

<sup>4</sup> A. G. 3. 10. 17; see generally Teuffel, i. § 164. 1, p. 258.

<sup>5</sup> Teuffel, i. § 167. 2, p. 263; also Müller's *Praefatio* to Varro de L. L. and ll. cc.

<sup>6</sup> See Teuffel, i. § 164. 1; Clinton, F. H. iii. 231.

<sup>7</sup> Above, § 3, p. 68. See too A. G. 2. 21. 8—10.

the fountain head, repeatedly citing the Pontiffs' books as his authority<sup>8</sup>. It seems to be established by Ritschl that he wrote a book *de jure civili*, i.e. probably on Roman Private Law; and, whether that work, which has not survived, were or were not the origin of Pomponius' *Enchiridium* (see above, § 3, p. 70), we may take it that Varro's testimony on any point of early Roman Law is of the highest value.

**Festus** is a name covering decidedly the greater part of our antiquarian contributions to the older law and legal history of Rome. The two portions, however, into which the work is divided are not to be considered as of exactly equal worth.

**Sex. Pompeius Festus** was the epitomiser, writing in the 2nd or 3rd century A.D.<sup>9</sup>, of a lost work, on the signification of words, by **M. Verrius Flaccus**. The latter is praised by Varro as *juris pontificii peritissimus*<sup>10</sup>, though some of his explanations of obscure archaic expressions (mainly from Cato's speeches) are criticised by Gellius<sup>11</sup>.

He was a learned freedman, chosen by Augustus as preceptor to his grandsons about 10 B.C., and died at an advanced age under Tiberius (A.D. 14—38)<sup>12</sup>. With the remarkable discovery of his inscribed *Fasti* near Praeneste, and the question as to the relic in the Cambridge Antiquarian Museum<sup>13</sup>, I have not here to do.

Among the authors quoted by Verrius Flaccus, or his epitomiser, are Aelius Stilo; Aelius Gallus, a jurist of Cicero's time, who wrote on the signification of terms relating to the *jus civile*; Antistius Labeo and Ateius Capito on Pontifical Law; "Cato" (perhaps only the father, not his

<sup>8</sup> E.g. Festus, F. Opima, p. 186; A. G. 2. 28. 3, &c.

<sup>9</sup> Teuffel, i. § 261. 5, p. 540.

<sup>10</sup> Macrobius, 1. 15. 21. Why the application to Verrius Flaccus is contested by Teuffel, i. § 261. 1, I do not see.

<sup>11</sup> A. G. 17. 6. See Teuffel, i. § 261. 2, p. 538.

<sup>12</sup> Suetonius, Gramm. 17. <sup>13</sup> See Teuffel, l.c. and i. § 74. 3, p. 105.

son Licinianus<sup>14</sup>); the Cincius, probably of the Ciceronian period, referred to above (§ 3, p. 69); and certain *Commentarii sacrorum pontificalium*<sup>14</sup>.

The epitome of Festus is known to us partly by a fragmentary copy of the latter half, now in the library at Naples (quotations from which are generally referred to as F), and partly by a more modern epitome of the whole, which appears to have mainly supplanted the original. This second epitome, which we have entire, is due to an ecclesiastic of the name of Paulus, who styles himself *Pontifex*, but is generally identified with a middle-age historical writer known as **Paulus Diaconus**<sup>15</sup>. His dedication, to Charlemagne, gives us a date about the beginning of the ninth century A.D.

There seems no reason to think either of the editors of Verrius Flaccus disposed, or perhaps qualified, to tamper with the fragments of old Latin; which may therefore be regarded as genuine antiques, or at least so considered in the time of Augustus. As between the two, the original Festus of course is the more valuable so far as it goes: Paulus (quoted for distinction as P) occasionally substituting the explanations of the first epitomiser for those of Verrius Flaccus without remark<sup>16</sup>. But for our present purpose, of preserving rather than explaining, old words and phrases, they do not seem to differ materially. I have used, both for Varro (L.L.) and Festus, reference to O. Müller's paging, because of the high authority still enjoyed by that editor's readings and annotations; but the views of Mommsen and Gradenwitz, in the last edition of Bruns' Fontes, where most

<sup>14</sup> See Sonticum, F. 290, Nexum, F. 165, Postliminium, F. 218, Posimerium, F. 249, Sistere and Subigere, F. 351, Mundus, F. 154, Praetor and Patricios, F. 241, Recto, F. 286, Tauri, F. 360, Nectere, F. 165.

<sup>15</sup> Festus, P. 1; see Teuffel, i. § 256. 6 and ii. § 500. 6.

<sup>16</sup> See Sas. F. 325 and my note in E. R. L. p. 9. For other variations cf. Anroena, P. 2 with Isidore, Orig. 14. 8. 33; and Properare, F. P. 234, 235 with A. G. 16. 14. 2, 3.

of the important passages are cited, have of course been taken into account.

**Q. Asconius Pedianus**, 3—88 A.D.<sup>17</sup>, was the author of commentaries on Cicero's speeches *in Pisonem*, *pro Scauro*, *pro Milone*, *pro Cornelio*, and *in toga candida*; writing probably about 54—57 A.D. He is a well-informed and trustworthy authority as to the judicial pannel and some matters of Public Law in Cicero's time. But we in particular owe to him (and to Dio) the little that we know of the important *lex Cornelia* (carried by the Tribune whom Cicero defended in his speech *pro Cornelio*), which first gave a statutory fixity to the Praetor's Edict, B.C. 67.

**Pseudo-Asconius** is the name given to an unknown commentator, or several unknown commentators, on the Verrine Orations. These Scholia, which come from the same MS. with those of the true Asconius, were long attributed to him. Their character and style, however, is quite different, and they are generally considered by modern authorities to belong to the 4th or 5th century of our era<sup>18</sup>. They do not appear to me necessarily to have been all written at the same time; and, though generally and correctly rated below Asconius Pedianus, they give us some useful information; among other things, on the early Civil Procedure at Rome, as to which they throw a little light upon the problems of the fragmentary Gaius 4. 15. The author cannot, of course, be used to *correct* Gaius, who was possibly, in this passage, his principal authority: but he may fairly be called in to eke out the defective text of the Verona MS.

**M. Valerius Probus**, sometimes reckoned as a jurist, belongs rather to the class of grammarians, of whom he was recognised as the most learned at Rome, Jerome tells us, in 56 A.D.<sup>19</sup> His native town was Berytus, a great centre

<sup>17</sup> Praef. to Kiessling and Schöll's edition, pp. vi, x.

<sup>18</sup> See Teuffel, ii. § 295. 3, p. 63.

<sup>19</sup> See Clinton, F. R. i. 39, and generally Teuffel, ii. §§ 300, 301, p. 73.

of legal and other education. He is mentioned as a general critic, of some severity, by Martial, in an epigram from the third Book, published about 87—greater severity being shewn to himself by Suetonius, who descants upon his study of books all but obsolete, and refers particularly to his editing and explaining old “contracted copies<sup>20</sup>.” His work “*de notis*” in fact contained the abbreviations recognised in his time, with the phrases *in extenso* for which they stood. Those relating to the *legis actiones* are, for us, of considerable value, as they form important connecting links in our sadly fragmentary knowledge of that difficult subject. All the *notae* used in law were collected in one book, and are partially preserved to us. They are printed in Mommsen’s *Collectio Juris Ante justiniani* (ii. 141—148), and in Girard’s *Textes* (170—174).

Plutarch’s *Quaestiones Romanae* (see above, § 4, p. 86), though classed under the general heading of Philosophical or Moral works, are purely antiquarian. They deal mainly with remnants of very early religious or semi-religious custom, and have accordingly enjoyed since the works of Tylor, Gomme, and more recently Frazer, a very much increased degree of attention. In a few points they touch upon old Roman Family Law, notably the questions of Agnatic relationship and of the alleged Marriage by Capture.

Aulus Gellius, the author of the well-known “Attic Nights,” was born c. 130 A.D., and was, when young, the pupil of Fronto<sup>21</sup>, a Consul *suffectus* in A.D. 143<sup>22</sup>. His book has been dated, on indifferently good mediaeval authority<sup>23</sup>, 169 A.D. Many valuable records of legal

<sup>20</sup> Martial, Epig. 3. 2. 12; Suetonius, Gramm. 24. Jahn, in his *Prolegg.* ad Persium cxxxvii. takes *contracta*=collecta; but ? when connected with *exemplaria* as in Suetonius.

<sup>21</sup> A. G. 19. 8. 1.

<sup>22</sup> Clinton, *Fasti Romani*, i. 130.

<sup>23</sup> Radulphus de Diceto. Teuffel, ii. § 365. 5, p. 234; see too i. § 258. 3 *ad finem*, p. 532. Teuffel himself suggests 175 as the date of publication.

antiquity are to be found in it, notably the extracts from the Twelve Tables in 20. 1, for which the author's authority was possibly Labeo<sup>24</sup>. This book is apparently unfinished, and of the eighth we have only the headings. Possibly some of the missing portions of Gellius' *Noctes Atticae* may exist unacknowledged in works of his followers such as the one next hereafter mentioned.

**Nonius Marcellus**, a lexicographer writing about the end of the third or beginning of the fourth century of our era, is of considerable use for the study of early Roman Law "in spite of his total want of solid information judgement and accuracy<sup>25</sup>." A follower, in great extent, of Gellius, he has also preserved to us valuable matter from lost books of Varro and of the older poets, which we should not otherwise have possessed. Most of the passages from his "*Compendiosa doctrina*" are given in Bruns' *Fontes* (ii. *Scriptores*) by Mommsen and Gradenwitz, who use for reference the paging of Gerlach and Roth's edition, 1842.

**Servius Maurus Honoratus**, the commentator on Virgil, is introduced by Macrobius, in his *Saturnalia*, as an interlocutor with Symmachus, the well-known champion of the old religion in 384 A.D.<sup>26</sup> Servius therefore may perhaps be said to have flourished about that time<sup>27</sup>. Although a late authority, he has preserved to us many valuable records of early law and religion. He quotes from books of Varro lost to us, and also, it would seem, from the Pontifical Archives themselves<sup>28</sup>. Many interpolations have evidently been made in his commentary, some of which, e.g. the so-called *Scholia Danielis*, are valued by Teuffel as highly as

<sup>24</sup> A. G. 20. 1. 13; see above, § 1, p. 23.

<sup>25</sup> Teuffel, ii. § 404<sup>a</sup>, p. 328.

<sup>26</sup> Macrobius, *Satt.* 1. 2. 15. See, for the *relatio* of Symmachus, Clinton, *F. R.* i. 507.

<sup>27</sup> Teuffel, ii. § 431. 1, puts the supposed date of the dialogue at 380.

<sup>28</sup> Servius on *Aen.* 5. 408—412, also on 8. 3 and 2. 149.



the original Servius: but there is no mistaking the genuine article<sup>29</sup>. Most of the notes of any importance are in Bruns. I may add that the pseudo-Asconian Scholia have been attributed to Servius "or his school"<sup>30</sup>.

**Macrobius Theodosius**, for that was probably the name by which he was more generally known<sup>31</sup>, has been rather confidently claimed as a Christian by certain religious controversialists. He was at any rate a deeply interested student of early Roman ritual and religion, with which the foundations of Roman Law are closely connected. Teuffel considers that he must have been pagan when his two works were written, but had probably adopted the Christian faith before his attainment of various high offices, dating from 399 to 422 A.D. Whether this had anything to do with the great Bishop of Milan whose name, Ambrosius, is in various MSS. prefixed to Macrobius Theodosius, I cannot say<sup>32</sup>.

Professing, as he does, to gather honey from the works of others, this author has been sometimes styled a *drone* by superior moderns. For my own part I have always found his *Saturnalia* peculiarly interesting: and, as he quotes, besides Gellius and Servius, many authors on Pontifical rites and early law, whom we have lost, his occasional help is not to be despised. As there is nothing in the *Somnium Scipionis* bearing on our subject, the references here given to Macrobius are only to the *Saturnalia*, for which I have used Jahn's edition. This author is *not* included among the *Scriptores* of Bruns.

**Priscian**, literally and truly a Grammarian, yet gives us, in his innumerable quotations from the oldest Roman writers, now lost, several words and phrases which throw light upon

<sup>29</sup> See E. R. L. 10.

<sup>30</sup> Teuffel, ii. § 295. 3, p. 63.

<sup>31</sup> See Teuffel, ii. § 444. 1, and Arianus' address to "Theodosi optime," ib. § 450. 1, pp. 434, 444.

<sup>32</sup> Ambrose died 397 A.D. Jahn, Prolegg. ad Macrobius, iv. xxii, is against the idea of Macrobius' Christianity.

early Roman Law. He no doubt drew largely from Nonius<sup>33</sup>, but contains much that is not found in that author, at least as we have him. Priscian's *Institutiones* were probably written about the beginning of the 6th century A.D. His vogue in the Middle Ages is well known. Priscian is not quoted in Bruns.

The last Roman Philosopher and the last Roman Philologer close our list.

**Boethius**, put to death by Theoderic 524 A.D., is best known by the *de consolatione philosophiae* which our own Alfred translated, and perhaps by Gibbon's somewhat bombastic eulogy (ch. 39 *ad finem*). He also wrote, however, amongst other works, a commentary on Cicero's *Topica*, which preserves, in a quotation perhaps from Ulpian's *Institutes*, important particulars of *coemptio* otherwise unknown to us. Mommsen suggests that the greater part of the legal matter in this commentary comes from Cicero himself<sup>34</sup>. This I venture to doubt. Boethius' sources were more probably the classical jurists Ulpian and Paulus<sup>35</sup>, whom he obviously had in a more complete condition than that in which they have come to us. Paulus' *Institutes*, for instance, only became known to have existed through a note of Boethius' on *Topica* 2. 4. 19<sup>36</sup>.

**Isidore** the Bishop of Seville, d. 636 A.D., wrote an etymological work called *Origines*, in which the fifth Book consists mainly of an explanation of legal terms. His etymologies are often absurd enough, and he seldom quotes his authorities: but he evidently drew from the classical jurists, independently of Justinian's compilations<sup>37</sup>; and he gives us a few definitions, presumably of theirs, which have not survived elsewhere. I have had a little help, too, from his *Differentiae Verborum*. He is quoted in Bruns.

<sup>33</sup> See Teuffel, ii. § 404\*. 1, p. 329, and ll. cc.; also § 481, p. 522.

<sup>34</sup> Bruns, 2. 75.

<sup>35</sup> Krüger, 502.

<sup>36</sup> Collectio Aj. ii. 160.

<sup>37</sup> Krüger, 503.

## § 6. SECONDARY SOURCES IN THE LITERARY PERIOD.

### 4. JURISTS.

Jurists generally as Sources, 97. The Jurists of the Digest, 98. Importance and difficulty of dating extracts, 99—101. Individual Jurists—(1) Of the Republic: Cato Minor, Manilius, Brutus, P. Mucius, Rutilius, 102; Q. Mucius, Aquilius Gallus, Servius Sulpicius, Namusa, Ofilius, Tubero, Trebatius, Cascellius, 103—105; Alfenus, Gallus, Fenestella, Junius Gracchanus, 106. Individual Jurists—(2) Of the Early Empire: Labeo, Capito, Nerva, Sabinus, 107; Mela, Vitellius, Fulcinus, Proculus, Nerva filius, 108; Cassius, 109; Atilicinus, Urseius Ferox, Pedius, Vivianus, 110; Caelius Sabinus, Fufidius, Aufidius Chius, Octavenus, Pegasus, 111; Plautius, Celsus pater, Aristo, 112, 113. Individual Jurists—(3) Under Trajan, Hadrian, &c. 98—192 A.D.: Javolenus, 114; Neratius and Celsus, Minicius, Arrianus, 115; Hadrian and the "Antonines," 116; Pomponius, 117; Julian, 118; Africanus, 119; Aburnius Valens, Vindius, Pactumeius Clemens, 120; Terentius Clemens, Junius Mauricianus, Venuleius Saturninus, 121; Maecianus, Ulpus Marcellus, 122; Papirius Justus, Papirius Fronto, Tarruntenus Paternus, 123; Gaius, Laelius Felix, 124—126; Scaevola, 127; dying out of Proculians, 128. Individual Jurists—(4) Under Septimius Severus, Caracalla and Alexander Severus, 129; Papinian, 129, 130; Arrius Menander, Tertullian, 131; Paulus, 131—134; Ulpian, 135—138; Modestinus, 138; Florentinus, 139; Callistratus, Tryphoninus, Marcianus, 140, 141; Julius Aquila, Aemilius Macer, Licinnius Rufinus, Furius Anthianus, Rutilius Maximus, Arcadius, 142; Hermogenianus, 143.

**Jurists generally as Sources.** From the time of Augustus until the somewhat abrupt dying away of Jurisprudence, in the technical sense of development of Law by *prudentes*, about 300 A.D.<sup>1</sup>, the writings of the Jurists are

<sup>1</sup> See Krüger, 348—350.

our main source both for legal history and law. From a hundred years before the latter date the Imperial Constitutions (mostly dated) come in as a Primary Source: from 300 we have Imperial legislation alone.

The amount of direct legal history which has come down to us from Roman Jurists is unfortunately small, being almost confined to the *Enchiridium* of Pomponius, on the faults and merits of which I have spoken elsewhere (§ 3, p. 70). But in their practical or exegetical works the juristic writers are fairly conclusive evidence as to the law of their own time, and among the best that we have, though not perhaps equally conclusive, as to what had gone before. As might be expected they touch comparatively little on anything but what was either still part of the law current, or necessary for its explanation (see above, § 3, p. 71).

**The Jurists of the Digest.** Pomponius has a goodly list of men of the highest estimation who "professed the Science of Civil Law," beginning with the mythical or semi-mythical Papirius (above, § 1, p. 13) and ending with Salvius Julianus, the compiler of Hadrian's Edict in 131 A.D.<sup>2</sup> But, although the particulars recorded by him as to each individual Jurist usually contribute something to our general knowledge of the development of Roman Private Law, few of those whom he enumerates can be regarded as to any extent Sources until some time after the establishment of the Empire. For the purposes of this section, all before Ti. Coruncanius, who was the first to "profess" law in the technical sense of publicly teaching it, are clearly out of court. Nor have we from either Coruncanius, who only taught, or his successors who also wrote, on law, any "remains" available for our enquiry, until we come to the younger Cato: on the testimony of the elder I have already spoken, but not as that of a Jurist proper (above, § 4, p. 84).

<sup>2</sup> Dig. 1. 2. 2. 35—53.

From about 150 years before our era we have scanty but increasing quotations of juristic writing from various quarters, but mainly from our great repertory, the Digest of Justinian; on which a few words of explanation may here be desirable. The juristic literature therein preserved comes to us in a fragmentary and occasionally an altered or modified form; Justinian's compilers only retaining what they required, of the works in their hands, and being expressly empowered by him to make alterations in what they retained. They were to avoid repetitions and contradictions, to suppress matter which had become superfluous or obsolete, to reform and to supplement<sup>3</sup>. These directions were to a certain extent carried out, but more perhaps with regard to terms and phraseology than to principles of law<sup>4</sup>. The extracts quoted were, as is well known, turned by the Emperor into Statute Law of his own. But, as he insisted upon a clear statement of their *provenance*, they are in themselves, so far as we can trust them to have retained their original form—which in the main they apparently did—contemporary testimony of earlier law. I have referred above to direct quotations from Hadrian's Edict (§ 1, p. 26), and am now speaking of statements by Jurists, in their own words, as to law of their own time.

**Importance and difficulty of dating extracts.** The fact that each extract gives us *primâ facie* contemporary law suggests a somewhat more *historical* method, than has been, I think, always employed, in discussing certain well-known difficulties of the Digest—a method in which may possibly be found the explanation for many of the so-called “Antinomies” which Justinian's compilers left—sometimes perhaps introduced<sup>5</sup>—in Roman Law. The apparent contradiction of passages, made artificially synchronous by that

<sup>3</sup> Const. *Deo Auctore*, §§ 7—10.

<sup>4</sup> See Krüger, 440—442.

<sup>5</sup> *Ib.*, p. 442.

Emperor, becomes at least more explicable, if we remember that in one author—say Brutus or Manilius—may be given the first, and in another—say Modestinus—the last stage of four hundred years' progressive development. From this point of view, therefore, it will be of importance not only to date each individual Jurist by a general "flourished," but, in the case of voluminous writers, to shew, if possible, the chronological order of their different works.

With the earlier authors, from whom we have few remains, and what there are mostly at second or third hand, the former proceeding is all that is necessary or possible. In their case, therefore, I have contented myself with giving full names, and such salient facts as will fix in the memory a rough date, preferably the *latest* ascertainable, for the individual writer. In those more fully and directly cited, of a later time, for whom we have data more detailed and multifarious, I have gone to some extent into the relative priority of their different books. But I cannot profess here to do more than direct the reader generally to that particular solution of Antinomies which has been suggested above. For the character and tone of a writer, or for the subject-matter of his individual works, I must refer to such larger treatment as will be found in Dr Roby's excellent Introduction to Justinian's Digest, chapters vii.—xv., to Krüger's *Sources*, and to Karlowa's *Rechtsgeschichte*, i. §§ 87—92. Under pressure of so much late matter, I hope I may be excused for taking Fitting at second-hand. Teuffel's invaluable History of Roman Literature has of course been in every case consulted; as, I need not say, has Lenel's *Palingenesia*, in which the useful Table at the end of Vol. 2 may be noted for those who have not time to discuss the author's conclusions in the body of the work.

It must, no doubt, be frankly admitted that some of the dates assigned depend upon rather slender inferences,

and can only be stated generally and approximately. But there are certain criteria, which (as in the case of Republican *leges* dated by their proposers' names) were formerly considered conclusive, and are now, I think, somewhat unduly disparaged.

The addition, for instance, of the term of consecration—*Divus*—to an Emperor's name, may of course be the insertion of a compiler; but, unless there is some special reason to the contrary, will generally be taken as shewing that the passage in question was written after that Emperor's death. The omission, on the other hand, of the *Divus*—the use of *Imperator*, *Augustus* or *Princeps* simply—is somewhat less conclusive that the Emperor in question was still alive, though the addition of *optimus* or *noster* is in favour of such a conclusion. Sometimes the bare title evidently arises from the literal quotation of a document in its original form. E.g. *Imperatores Antoninus et Verus rescripserunt* occurring repeatedly in Papirius Justus, a collector of *Constitutiones*, is not regarded as a proof that he wrote under Marcus and Verus, &c. (see below, p. 123). Apart from these cases, a special irregularity as to the omission of *Divus* has been remarked in an early work of Papinian, his *Quaestiones*<sup>6</sup>. The bare *Imperator* has also been disregarded in the case of Ulpian, by some, as any indication of the Emperor named being at the time in existence<sup>7</sup>.

By way of caution against a line of argument too much in favour with some modern historians, I would here remark that a strong distinction ought to be made between the reasonable conclusion from actual notice of some event or enactment, and the mere inference from silence in a case where we should have expected them to be mentioned<sup>8</sup>.

<sup>6</sup> Roby, *Int.* cxvi. Krüger, 265, n. 1. Also below, p. 129.

<sup>7</sup> See Roby (citing Fitting), *Int.* cxix.

<sup>8</sup> Query, for instance, the weight of Mommsen's argument as to the nationality of Gaius, based on *Ga.* 3. 24 (*Roby, Int.* clxxvi e).

**Individual Jurists. (1) Of the Republic.** The Jurists may, for my present purpose, be divided roughly into four groups. (1) Those of the Republic, a period ending with the establishment of Augustus' sovereignty in B.C. 30; (2) those of the Early Empire, from B.C. 30 to about 100 A.D. (the actual date which I take is the accession of Trajan, A.D. 98); (3) those under Trajan, Hadrian and the Antonines (including Commodus), 98—192 A.D.; (4) those under Septimius Severus, Caracalla, and Alexander Severus, 193—235 A.D. I give names in full, so far as they can be ascertained, enclosing in square brackets [ ] those by which the Jurist is *not* habitually cited.

In the first group few, as has been said (p. 98), can be regarded as direct sources.

The younger **Cato**, [M. Porcius] Cato [Licinianus], who died before his father, in 152 B.C., is supposed to be referred to in Justinian's Institutes, 1. 11. 12, and to be the author of the *regula Catoniana* (Dig. 34. 7). We have no direct quotation from his books, written, we are told<sup>9</sup>, *de juris disciplina*.

Two other early Republican Jurists are occasionally referred to in the Digest, [M.] **Manilius**, Consul in 149 B.C., and [M. Junius] **Brutus**, of about the same time, once Praetor, but when we do not know<sup>10</sup>. So also are the somewhat later **P. Mucius** [Scaevola], Consul 133 B.C., the editor of the *Annales* (above, § 3, p. 73); and a **Rutilius**, probably the P. Rutilius by whom, as Praetor, the formula mentioned by Gaius, 4. 35, was introduced<sup>11</sup>, and the P. Rutilius Rufus, who was Consul in 105 B.C.

Formulas of stipulation and pleading by Manilius are quoted or referred to by Varro<sup>12</sup> in his book on Agriculture

<sup>9</sup> A. G. 13. 20. 9.

<sup>10</sup> Dig. 1. 2. 2. 39.

<sup>11</sup> See also his decision on the *honor patrono debitus*, Dig. 38. 2. 1. 1.

<sup>12</sup> Varro, R. R. 2. 3, 5.



(above, § 4, p. 84), Rutilius is also supposed to have been the author of the so-called *Rutiliana constitutio*, as to purchase of a woman's property without the sanction of her Tutor<sup>13</sup>: but none of these authors are quoted directly in the Digest<sup>14</sup>.

In the Ciceronian, or rather the last republican, period, which may be taken roughly as extending from 100 to 30 B.C., the earliest and not the least conspicuous figure is that of Q. Mucius [Scaevola] the Pontiff (son of the above-mentioned P. Mucius), who was Consul in 95, and was murdered by the partisans of the younger Marius in B.C. 82. His *ſpoi*<sup>15</sup> is the oldest juristic work directly cited in the Digest. It may be remarked that the book in question, together with such works of Labeo as are represented to be directly cited (though in an epitomised form), generally come towards the end of a Title in the Digest, where there is often a sort of Appendix containing, *inter alia*, books apparently not much used in the later study or practice. The main work of Scaevola, a systematic treatise, the first so arranged, *de jure civili*<sup>16</sup>, as it is not quoted, had evidently been superseded by later works or editions<sup>17</sup>.

Other famous Jurists of the same time were [C.] Aquilius Gallus, Praetor (with Cicero amongst others) in 66 B.C., and Servius [Sulpicius Rufus], Consul 51, d. 43 B.C.

Aquilius was the author of the *judicium* or *formula de dolo malo*<sup>18</sup>, and the *Aquiliana stipulatio* (Just. 3. 29. 2).

<sup>13</sup> Vat. Frag. 1. Collectio Juris Antej. iii. 20. The style surely is an anachronism.

<sup>14</sup> See generally, on them, Krüger, 74—76: Roby, Int. xcv.—ci.

<sup>15</sup> Literally *definitions*, but no doubt also, if not chiefly, consisting of *regulae juris*: see Karlowa, i. 481, n. 3.

<sup>16</sup> Pomponius, Dig. 1. 2. 2. 41.

<sup>17</sup> E.g. that of Pomponius himself *ad Quintum Mucium libb. xxxviii*.

<sup>18</sup> Cicero, de Nat. Deorum, 3. 30. 74: de Officiis, 3. 14. 60: Lenel (Ed. 93, n. 1) objects to the plural *formulas* in the latter passage. In so general a defence, or count, as *d. m.* surely different forms might well be framed for different classes of cases.

He was the most distinguished among several pupils of Q. Mucius who enjoyed a high professional reputation: but their works were not ultimately popular, and were mainly known from their adaptation or absorption by Aquilius' more voluminous and famous pupil Servius<sup>19</sup>. The latter was also the head of a large school, of whom **Aufidius Namusa**, once or twice cited by writers of the Digest, is the only one that need here be mentioned<sup>20</sup>.

Servius is not only placed at the head of his profession by his friend and contemporary Cicero, but is continually referred to on disputed points, as the author of the "prevailing" or better opinion, by the later Jurists. Reference is also frequently made to Aquilius, but neither he nor Servius is cited directly in the Digest, though we have a passage of some length from the *de dotibus* of the latter in the Attic Nights<sup>21</sup>.

We have similar reference without direct citation in the case of [Aulus] Ofilius, a pupil of Servius, and [Q. Aelius] Tubero, a pupil of Ofilius. Ofilius was evidently on terms of friendship with Atticus, and well known, though perhaps only as a professional adviser, to Cicero, from whom we have letters referring to him in 45 and 44 B.C. Of more interest is his intimate connexion with Caesar, and his probable employment on a general codification of Roman Law contemplated by that great man and stopped by his murder<sup>22</sup>. We know that Ofilius wrote on the *leges*, whether the XII. or the statutes generally then in force; on the *Civil*, i.e. old non-statutory, Roman Law, arranged under

<sup>19</sup> Pomponius, Dig. 1. 2. 2. 42—44.

<sup>20</sup> See as to the probable nature of this Jurist's work, Roby, Int. cxvi. and Krüger, 88, n. 4.

<sup>21</sup> A. G. 4. 4. 2.

<sup>22</sup> See Suetonius, Julius, 44. The *immensa legum copia* of this passage is either an absurd exaggeration or *lex* is used in a very late sense. See Ga. 1. 7.

heads; and *per* Actions<sup>23</sup>. He was also the first to reduce the Edict to a systematic form, as distinguished from a mere brief commentary which had been left by Servius<sup>24</sup>.

Of Tubero we know very little. He studied under Ofilius and served under Pompeius. His unsuccessful prosecution of Ligarius, in 46 B.C., failed in consequence of the defence by Cicero, which is one of the extant Orations. As to literary work Tubero was a learned and prolific writer, but unpopular from his affectation of an antiquated style<sup>25</sup>.

A Jurist deserving separate mention, as a sort of connecting link between the Ciceronian and the Augustan period is [C.] Trebatius [Testa], the first teacher of Labeo<sup>26</sup>. A friend of Cicero, by whom he was recommended to Caesar during the latter's Proconsulate in Gaul, B.C. 54, he evidently gained the friendship of his patron, and already appears as an authority on the Law of Inheritance<sup>27</sup>; and he finally attained the highest degree of reputation *inter prudentes* under Augustus<sup>28</sup>, the particular occasion referred to being the first recognition, at Trebatius' instance, of *Codicilli*. Teuffel<sup>29</sup> makes Trebatius to have been still living "about 14 B.C." The Satire addressed by Horace to Trebatius (2.1) is generally dated about 33—30 B.C. This Jurist is frequently referred to, but not cited at first hand, in the Digest.

<sup>23</sup> As to his *de legibus*, possibly addressed *ad Atticum*, see Lenel, Pal. i. 798 n. 3 and 799, citing Gaius 2 *ad xii* Dig. 50. 16. 234. 2; as to the *actiones* Dig. 33. 9. 3. 5, 8.

<sup>24</sup> Pomponius, Dig. 1. 2. 2. 44, *Is fuit Caesari familiarissimus et libros de iure civili plurimos et qui omnem partem operis fundarent reliquit. nam de legibus xx libros conscripsit: de iurisdictione idem edictum praetoris primus diligenter composuit, nam ante eum Servius duos libros ad Brutum perquam brevissimos ad edictum subscriptos reliquit. I have adopted Huschke's emendation of the impossible *vicensimae*. See Teuffel, i. § 207. 2, p. 370. Contra, Karlowa, i. 486, 487.*

<sup>25</sup> Pomponius, Dig. 1. 2. 2. 46.

<sup>26</sup> Pomponius, Dig. 1. 2. 2. 47.

<sup>27</sup> Cicero, Epp. ad Fam. 7. 5, 6, 11, 17; ib. 21, 22.

<sup>28</sup> Just. 2. 25 pr.

<sup>29</sup> Teuffel, i. § 207. 3, p. 371.

The same is to be said of **A. Cascellius**, a contemporary of Trebatius and Ofilius, living as late as 20 B.C.<sup>30</sup>, and presumably the author of the *Cascellianum iudicium* of Ga. 4. 166.

On the other hand [**P.**] **Alfenus Varus**—properly perhaps Alfenius or Alfinius<sup>31</sup>—a pupil of Servius Sulpicius, and Consul *suffectus* in 39 B.C.<sup>32</sup>, is directly quoted in the Digest, though mainly, I think, from an abridgement or epitome of his own *Digesta*, which we owe to Paulus. It is by no means clear whether the subject of the verb *respondit*, often found in the extracts from this author, is Alfenus himself or his master Servius, the preservation of whose opinions was probably the reason for so much quotation from Alfenus<sup>33</sup>.

An interesting enquiry, too long for this place, may be read in Teuffel and Roby<sup>34</sup>, as to the possible identity of this Jurist on the one hand with the *Alfenius vaser* of Horace, Sat. 1. 3. 130, on the other with Virgil's fellow-student in Epicurean philosophy, who nevertheless allowed his friend's little estate to go to the spoiler in B.C. 40. The curious passage from Alfenus' *Digesta*, preserved to us as Dig. 5. 1. 76, seems to me rather in favour of the latter identification: the former is probably mere guess-work of Horace's commentators, Porphyrio or Acro.

Here may be mentioned a small group of authors, **C. Aelius Gallus**, **Fenestella** and **Junius Gracchanus**, who,

<sup>30</sup> He is mentioned in Horace, A. P. 370. See Teuffel, i. § 239. 7, p. 471.

<sup>31</sup> See the Index to Dio's Book 55, on the year 2 A.D., and Orelli on Horace, Sat. 1. 3. 130. These forms are more like a *gentile* name. Corssen however (i. 305) would evidently maintain Alfenus, which he derives from \**Alfere*=albere.

<sup>32</sup> So Teuffel, i. § 208. 3, p. 373, and Osann, Pomponius, p. 87.

<sup>33</sup> So Karlowa suggests i. 485. On the question as to *respondit*, see Krüger, 86, nn. 2, 3, 6.

<sup>34</sup> Teuffel, i. § 208. 3, p. 373: § 224. 3, p. 426: Roby, Int. cxiii., cxiv. See too Krüger, 85, n. 7.

like **Granius Flaccus** (above, § 1, p. 17), are occasionally cited as Jurists, but belong rather to the class of Grammarians or Historians. Gallus can only be dated by the frequent quotations from him of Verrius Flaccus (above, § 5, p. 90); Fenestella died, according to Jerome, 19 A.D., at the age of 70; Junius Gracchanus belongs to an earlier time, as his book, *de potestatibus*, cited by Ulpian (Dig. 1. 13 pr.), was addressed to the father of Atticus, Cicero's friend<sup>35</sup>.

**Jurists. (2) Of the Early Empire.** From the establishment of Augustus' sovereignty, B.C. 30, to the end of Nerva's reign, A.D. 98, forms a convenient period which we may call the Early Empire. To the first half of this period belong the heads of the well-known rival schools [**M. Antistius**] **Labeo**, dated by Teuffel c. 54 B.C.—17 A.D., and [**M. Ateius**] **Capito**, Consul *suffectus* 5 A.D., *d.* 22 A.D.<sup>36</sup> Labeo was succeeded by [**M. Cocceius**] **Nerva** (grandfather to the Emperor), Tiberius' inseparable friend and councillor<sup>37</sup>—who however, in the end, A.D. 33, thought well to escape, by a voluntary death, from the evil days to come<sup>38</sup>. Capito's successor was [**Masurius**] **Sabinus**, the first licensed Jurist<sup>39</sup>, and the writer of three books, *juris civilis*<sup>40</sup>, often quoted by Gellius, but not in the Digest, though the commentaries thereon by Pomponius, Paulus and Ulpian furnish the greater part of what is distinguished, in modern phrase, as "the Sabinian mass" in the normal arrangement of a Title. Sabinus lived to comment on the *Scutum Neronianum*,

<sup>35</sup> See Teuffel, i. § 208. 4, p. 374; § 259. 1, p. 534 as to Gallus and Fenestella: as to Junius, § 138. 2, p. 201. He was called *Gracchanus* from his friendship with Caius (*d.* 121 B.C.) says Pliny, N. H. 33. 9. 36.

<sup>36</sup> The dates for Labeo are Teuffel's, i. § 265, p. 550. We only know that he died before Capito (A. G. 13. 12. 1). For Capito's Consulship, Fasti Cap: for his death, Tacitus, Ann. 3. 75.

<sup>37</sup> Pomponius, Dig. 1. 2. 2. 48. Tacitus, Ann. 4. 58.

<sup>38</sup> Tacitus, Ann. 6. 26. For another, very feeble, reason, see Dio 58. 21.

<sup>39</sup> Pomponius, Dig. 1. 2. 2. 48—50.

<sup>40</sup> Index Florentinus.

which has been put as late as 64 A.D.<sup>41</sup> A reference by the poet Persius (*d.* A.D. 62), to Sabinus, only shews that some work on Criminal, or at least Delictal, law had been written by this Jurist before that date<sup>42</sup>.

To this generation apparently belong:—

[**Fabius**] **Mela**, coupled, as a contemporary and perhaps an associate, with Labeo, and commented on by Proculus; **Vitellius**, on whom Sabinus wrote a regular commentary, and Cassius notes; and **Fulcinus Priscus**, sometimes cited as *Priscus* only, on whom Neratius comments<sup>43</sup>.

A little later than Nerva comes [**Sempronius**] **Proculus**<sup>44</sup>, who succeeded him as head of Labeo's school, but was apparently more a contemporary than a pupil of the older Jurist, with whom he is continually coupled. Certain notes of Proculus upon Labeo (perhaps on the Edict), are occasionally referred to, and his *Epistulae* form one of the few works of the early Jurists which are directly quoted in the Digest. His high repute is shewn by the fact that the School of Labeo were henceforth known as *Proculeiani* or *Proculiani*. We have no definite date for Proculus except the above connexion, and the fact that he was contemporary with **Nerva**

<sup>41</sup> Ga. 2. 218. As to the date of the Senatus Consultum, see Moyle on Just. 2. 20. 2. Should it not be 54? For the possible date of Sabinus' license (14 A.D.) see Clark, P. J. 295, n. 59.

<sup>42</sup> Sat. 5. 90, Excepto si quid *Masuri* rubrica vetavit. Note the authority implied in the *rubrica* of a *lex* or *text.* This may be the *liber de furtis* referred to by Gellius, A. G. 11. 18. 12. See Karlowa, i. 689.

<sup>43</sup> As to Mela see Dig. 19. 2. 13. 8: 47. 10. 17. 2: 9. 2. 11 pr.: as to Vitellius, Dig. 33. 7. 12. 27. Sabinus' commentary was apparently re-edited by Paulus. See Dig. 28. 5. 18 and Lenel, Pal. i. 1301, n. 2. I do not see why this should not have been the Emperor's grandfather, Augustus' man of business, see Suetonius, Vitel. 2. As to Fulcinus, Dig. 39. 6. 43: 7. 8. 10. 2. In "Et Priscus et Neratius," of the latter passage Mommsen reads, but only on Stephanus' authority, *Proculus*. See generally, Karlowa, i. 693.

<sup>44</sup> The Sempronius depends on Dig. 31. 47, where however Mommsen reads *Nepos* Proculo. See Krüger, 204, n. 8. Karlowa, i. 690, retains *Sempronius*.

filii of the same school though of less authority<sup>45</sup>. This latter Jurist was father of the Emperor, and is probably the M. Cocceius Nerva made Consul *suffectus* A.D. 40. The Cocceius Nerva, who was Praetor *designatus* in A.D. 65<sup>46</sup>, I should rather identify, as does Orelli, with the Emperor himself, although the coincidence of this honour with the disgrace (in the same year) of Cassius (see below), might possibly indicate the person upon whom it was conferred as a representative of the rival school.

[C.] Cassius Longinus, who succeeded Sabinus as head of his school, was Consul *suffectus*, A.D. 30, and at some time in his career—possibly about 58—Praetor, in which office he earned the high title *sanctus*<sup>47</sup>. Although the chief lawyer of his time, Cassius did good service as a soldier, against the Parthians, in 49 A.D.<sup>48</sup>, and was one of the most influential Ministers of State, until he incurred the enmity or jealousy of Nero, being accordingly, in 65 A.D., banished to Sardinia<sup>49</sup>.

This important Jurist is often referred to or quoted by writers in the Digest, but there is no direct extract from his works. He gave his name, alternately with that of his master Sabinus, to the later followers of Capito, as Proculus did to those of Labeo. Like "Nerva et Proculus" (sometimes, but rarely, Nerva et Labeo), Sabinus et Cassius is a familiar phrase in the Digest and Gaius. The latter pair, it may be remembered, are those whom Gaius mainly follows<sup>50</sup>.

<sup>45</sup> Pomponius, Dig. 1. 2. 2. 52.

<sup>46</sup> Tacitus, Ann. 15. 72. Lenel considers this to be Nerva filius (Pal. i. 791).

<sup>47</sup> Pomponius, Dig. 1. 2. 2. 51. As to Praetorship *after* a Consulate, see Mommsen, S.R. ii. 89, n. 1. For the case of Cassius, compare Dig. 4. 6. 26. 7 with Tacitus, Ann. 13. 41. Aristo calls him in Dig. 29. 2. 99 *Sanctum Cassium praetorem*.

<sup>48</sup> Tacitus, Ann. 12. 12: Dio Cassius, 40. 29.

<sup>49</sup> Pomponius, l.c. and Tacitus, Ann. 16. 9.

<sup>50</sup> See Dig. 41. 1. 7. 7, and compare Ga. 3. 141 with Just. 3. 23. 2.

There is a small group of Jurists, occasionally referred to, but affording no very definite date, who have been generally placed about this time. Of these, **Arrianus** must, however, in my opinion, be rather a contemporary of **Javolenus** and **Pomponius**<sup>51</sup>.

**Atilicinus** appears to have been a contemporary and friend of **Proculus**<sup>52</sup>; **Urseius Ferox** of **Cassius**<sup>53</sup>; **Sextius Pedius** may have been writing as early as the time of **Probus** (see § 5, p. 93), if an abbreviation of that author's in the **Einsiedlen MS.** really refers to him<sup>54</sup>. I have sometimes imagined the same **Pedius** to be the immoral, or rather non-moral, pleader described in **Persius' 1st Satire**<sup>55</sup>, which would also suit the time of **Nero**. But all this is very doubtful. For **Vivianus** we have no indication of date except that he refers to **Proculus** and is referred to in the **Digest of Celsus**<sup>56</sup>.

Passing from the **Claudian** to the **Flavian** dynasty—after the portentous year of the four Emperors, 69 A.D.—we find a connecting link in the banished **Cassius**, who lived apparently just long enough to be recalled by **Vespasian**<sup>57</sup>;

<sup>51</sup> See **Karlowa**, i. 702. 3: **Krüger**, 229, nn. 3, 4.

<sup>52</sup> **Dig.** 23. 4. 17, **Atilicinus Proculo suo salutem**.

<sup>53</sup> On the question of their relative priority, which turns rather on the reading of **Dig.** 44. 5. 1. 10, see **Karlowa**, i. 694 as against **Krüger**, 213, n. 3; also **Teuffel**, ii. § 316. 3, p. 105.

<sup>54</sup> **S. P. M. Sextii Pedii Medivani. Collectio Juris Antej.** ii. p. 148.

<sup>55</sup> **Persius**, 1. 85, "**Fur es**" ait **Pedio**. **Pedius** quid? **Crimina rasis Librat** in antithetis, &c. In **Dig.** 47. 2. 50. 2, **Pedius** analyses the *animus furandi* but without any particular quibbling or moral obtuseness. **Persius** perhaps had merely a layman's feeling with regard to special pleading in general. **Probus**, in his life of **Persius**, comments on the **Pedius** of the **Satire** but calls him *quidam damnatus pecuniarum repetundarum*. See **Jahn**, **Prolegg. ad Persium**, cliii.

<sup>56</sup> **Dig.** 4. 8. 21. 11: 29. 7. 14 pr. For date of **Celsus' Digest**, see below, p. 115. **Lenel**, **Pal.** ii. 1225, puts **Vivianus**, with a query, under **Trajan**.

<sup>57</sup> **Pomponius**, **Dig.** 1. 2. 2. 51. **Tacitus**, **Ann.** 16. 9, says **Senectus ejus expectabatur** (by the tyrant). "**Mori jussis**" of **Suetonius** (**Nero**, 37), which has been made a difficulty, does not refer particularly to **Cassius**.



also in **Caelius Sabinus**, his successor as head of the Sabinian school, who had been one of the *Consules suffecti* selected by Galba, or Nero, in 69, and was afterwards a high authority in the reign of Vespasian, 70—79 A.D.<sup>58</sup>

To this time appear also to belong two or three other little-known authors, of whom **Octavenus** is inferred to have been acquainted with a *Senatus Consultum Pegasianum* (see below); **Fufidius** and **Aufidius Chius** each comment on *responsa* of Atilicinus (above, p. 110), and Aufidius is mentioned in an epigram of Martial dating about 89 or 90 A.D.<sup>59</sup> I cannot place them nearer than this.

Of very different importance is **Pegasus**, the successor to Proculus, who was Praefect of the city under Vespasian<sup>60</sup>. According to a Scholiast on Juvenal's 4th Satire (76—81), the strange name of this Jurist came from the ship's figure-head of his father, trierarch of a Liburnian brigantine. Pegasus had earned the repute, by his legal studies, of being "a book rather than a man": he had held every high office, our account goes on, and presided over several provinces, before his charge of the city. Juvenal's own words give me somewhat the idea of a *parvenu*, whose appointment—rather as a sort of Bailiff than a Mayor—to the post of Praefect, was a surprise, and his administration the well-intentioned feebleness of a mere student. However that may be, a special point of interest to us, in the passage, is that the appointment could still be spoken of as *recent* under Domitian, and therefore must, as is well shewn by Roby<sup>61</sup>, have been quite at the close of Vespasian's reign. This may give

<sup>58</sup> Tacitus, Hist. i. 77: Dig. 1. 2. 2. 53.

<sup>59</sup> For Octavenus see Dig. 36. 1. 69 pr., and Krüger, 210, n. 8. For Fufidius, Dig. 34. 2. 5. For Aufidius, Frag. Vat. 77, and Martial, 5. 61. 10. As to the date of this Book, Teuffel, § 322. 4, p. 123.

<sup>60</sup> Pomponius, Dig. 1. 2. 2. 53.

<sup>61</sup> Roby, Int. cli.

us an approximate date (78 or 79 A.D.) for the *Senatus Consulta Pegasiana*, of which we are only told that they were passed in the Consulship (not otherwise recorded or dated) of Pegasus and Pusio<sup>62</sup>.

A probable contemporary of Caelius Sabinus and Pegasus was **Plautius**, who, though not mentioned by Pomponius as a leader in either of the two schools, was evidently a writer of great importance on the *jus honorarium*, for which, according to Krüger, he probably did as much, in his time, as Sabinus for the *jus civile*. Plautius appears to have made a sort of harmony of his predecessors<sup>63</sup>—e.g. Cassius and Proculus—being, in his turn, commented on by Neratius Priscus, Javolenus, Pomponius and Paulus.

Krüger comes to the conclusion that Plautius only knew the Edict as it was *before* Hadrian's revision in 131<sup>64</sup>. A still earlier date for Plautius' work may possibly be given by the death of Javolenus, who seems to have been the first commentator on it, and who may not have survived Trajan (see below, p. 115).

Pegasus was succeeded in his headship of the Proculian school by the elder [**Juventius**] **Celsus**<sup>65</sup>, often distinguished from his more famous son, by whom he was in turn succeeded, as Celsus *pater*. We may place him at some time in the reigns of the three Flavian Emperors, 70—96 A.D. The Consulship of Ducenus or Ducennius Verus, of whose *Concilium* the younger Celsus tells us his father was a member<sup>66</sup>, may have been in 87 A.D.<sup>67</sup>

Last may be mentioned [**Titius**] **Aristo**, who was probably a pupil of Cassius<sup>68</sup>, but lived into the time of Trajan, to

<sup>62</sup> Ga. 1. 31: 2. 254: Just. 2. 23. 5 adds *Vespasiani Augusti temporibus*.

<sup>63</sup> Frag. Vat. 77 (Coll. Aj. iii. 41), *Omnes auctores apud Plautium de hoc consenserunt, &c.*

<sup>64</sup> Krüger, 211.

<sup>65</sup> Pomponius, Dig. 1. 2. 2. 53.

<sup>66</sup> Dig. 31. 29 pr.

<sup>67</sup> See Roby, Int. cliv.

<sup>68</sup> Dig. 4. 8. 40. Karlowa, i. 699, thinks him rather a Proculian.

whose Council he belonged<sup>69</sup>. Aristo was a valued friend of the younger Pliny; who writes of him, about 100 A.D., in the highest terms, and to him in a letter referring to an event which apparently did not happen before 105<sup>70</sup>. On the questions as to Aristo's *decreta Frontiana*, the Digest made by him or from his works, and generally the editing of Aristo by Pomponius I must refer to more detailed accounts<sup>71</sup>.

The above writers of the early Empire, roughly B.C. 30—A.D. 100, are frequently referred to and quoted in the Digest, but the following are the only books from which direct extracts are made—the *Epistolae* of Proculus, possibly considered as representing Labeo (see above on Alfenus and Servius, p. 106), the *Pithana* and the *libri posteriores* of Labeo himself. Of these two works the former was, in all probability, an abridgement made by Paulus<sup>72</sup>: the *posteriores* are posthumous remains epitomised or edited by Javolenus<sup>73</sup>. Both come, like the time-honoured *ῥποι* of Q. Mucius, in that Appendix at the end of some Titles, to which reference has been made above (p. 103).

Few of the quotations or references hitherto described can be exactly dated: we have to content ourselves with noting the *later* limit approximately established for their

<sup>69</sup> Dig. 37. 12. 5.

<sup>70</sup> For the former date (as given by Teuffel) Pliny, Epp. 1. 22. The event mentioned in the second case (Epp. 8. 14. 12) is the murder of Afranius Dexter, a Consul. The date here adopted (105) is that of Roby, Int. clvi. and Karlowa, i. 698, n. 4. The Fasti as given by Clinton (F. R. i. 85) put Afranius' Consulship and murder at 98 A.D.

<sup>71</sup> See Dig. 29. 2. 99: 24. 3. 44 pr: Karlowa, i. 699, 700; Roby, Int. clvi. and Lenel, Pal. i. 61, n. 1.

<sup>72</sup> See Krüger, 191, n. 2, Lenel, Pal. i. 528, n. 3, and below, p. 132. Similarly as to Alfenus, above, p. 106.

<sup>73</sup> See Krüger, 192 and 216, 217. Quotations like Dig. 40. 12. 42 would seem to preserve Labeo's own words: so Lenel, Pal. i. 299, n. 4, as to the extracts generally which begin, as there, Labeo libro...posteriorum.

respective authors. So far, however, as we can speak to the time of writing, our references may be taken as truly representative of contemporary Law: if for no other reason, on account of the *criticism* to which they are often subjected, shewing them to be fairly literal quotations.

**Jurists.** (3) Under Trajan, Hadrian, &c. 98—192 A.D. The first Jurists from whom we have direct extracts to any great amount belong to the time of Hadrian or a little before him. Three may be named as a sort of precursors to the main group, one of the three, Neratius, being, in fact, specially named in connexion with Aristo.

**Javolenus** [Priscus] succeeded Caelius (above, p. 111) as head of the Sabinians<sup>74</sup>. From two recently discovered inscriptions Karlowa<sup>75</sup> concludes that this Jurist, the string of whose other names is given below<sup>76</sup>, was born before 60, because Consul before 90 A.D. It is at least clear that, at the latter date, he was *legatus consularis* of Germania Superior. He held the same office also, perhaps later, in Syria, and was Proconsul of Africa, to which governorship his pupil Julian refers in a book written under Hadrian: the words used, like those of Pomponius in speaking of Julian as successor to Javolenus, rather indicate that Javolenus was then dead<sup>77</sup>. That Jurist moreover is *not* named as one of Hadrian's Council, whereas we know from a letter of Pliny, dating 106 or 107 A.D., that Javolenus was then a member of Trajan's and had attained the privilege

<sup>74</sup> Pomponius, Dig. 1. 2. 2. 53.

<sup>75</sup> Karlowa, i. 697. See *Ephemeris Epigraphica*, v. 654, 5.

<sup>76</sup> C. (more probably L.) Octavius Tadius Tossianus Javolenus Priscus. The name by which he is generally known is an odd one. It is not, apparently, *personal*, occurring for 3 or 4 different individuals in C. I. L. (vi. 19663—19668). It would appear to be the same as *Diabolenus* in Capitolinus' life of Pius (12. 1) though to make our Jurist a member of Pius' council seems a mistake. See Teuffel, ii. 342. 3, p. 185.

<sup>77</sup> Dig. 40. 2. 5 Julian: cf. Dig. 1. 2. 2. 53 Pomponius.

*publice respondendi*<sup>78</sup>. He therefore probably died in Trajan's reign. ¶

"*Priscus*" alone, which is occasionally found in the Digest, has been taken to mean Javolenus, but may rather be Neratius. In Dig. 7. 8. 10. 2, where "*Priscus et Neratius*" would be conclusive, Mommsen is apparently justified in reading Proculus.

[L.] Neratius [Priscus] and [P. Juventius] Celsus are named as joint successors to Celsus *pater* (above, p. 112) in the Proculian school<sup>79</sup>. Both were, together with Julian, among the chief legal advisers of Hadrian<sup>80</sup>, who reigned from 117 to 138 A.D.; the former also, together with Aristo, among those of his predecessor Trajan<sup>81</sup>. Celsus was Praetor in 106 or 107<sup>82</sup>, and Consul for the second time in 129, when the important *Senatus Consultum Juventianum* was passed<sup>83</sup>. The date of his first Consulship or of the single one of Neratius need not detain us.

All these three authors—Javolenus, Neratius, Celsus—are cited directly and frequently in the Digest. On their various works in detail see Roby, Int. clviii—clxii, and Krüger, 215, 220, 226. As between those works no order of time can be inferred with any confidence.

Two less important Jurists, supposed to belong to this period, are referred to but not directly quoted in the Digest.

Minicius, considered worthy to be commented on by Julian (*VI libri ad Minicium*), was apparently a follower of Sabinus, whom he represents himself as, on one occasion, personally consulting. He has been identified with a L. Minicius Natalis, who was a Consul in 106 A.D., and probably the addressee, as Proconsul, of a rescript of Trajan, Dig.

<sup>78</sup> Pliny, Epp. 6. 15.

<sup>79</sup> Pomponius, Dig. 1. 2. 2. 53.

<sup>80</sup> Spartianus, *Had. vita*, c. 18: see however Krüger, 220. 7.

<sup>81</sup> Dig. 37. 12. 5.

<sup>82</sup> Pliny, Epp. 6. 5. 4.

<sup>83</sup> Cf. Ga. 2. 57 with Dig. 5. 3. 20. 6 which gives the full name of Celsus.

2. 12. 9, holding the position of *legatus* in Pannonia, A.D. 117. Time seems on the whole against this identification<sup>84</sup>.

On *Arrianus* see above, p. 110.

**Hadrian and the Antonines.** The reigns of these sovereigns are the first great period of Roman juristic literature. As the occurrence of three or four *Antonini* is rather puzzling, it may be convenient here to give the dates, and some of the more important *names* of the Emperors, those by which they are *not* usually referred to, in the Digest or Codex, being, as in the case of the Jurists, enclosed in square brackets.

A.D. 117—138. [*P. Aelius*] *Hadrianus*: also, after his death, *divus Hadrianus*.

138—161. [*T. Aurelius*] *Antoninus Pius* or *Imperator Titus Antoninus*: also, after his death, in Marcus' reign, *divus Antoninus*; later, *divus Pius* or *divus Antoninus Pius*.

161—169. *M. Aurelius Antoninus* and *L. [Aurelius] Verus*: also, after the death of Lucius, *divus Lucius* or *Verus*, and, after the death of both, *divi fratres*, or, more rarely, *divi Marcus et Verus*.

169—176. Sole reign of Marcus Aurelius. *Imperator Marcus*: also, after his death, *divus Marcus*.

Between 176 and 180, Commodus being associated with his father, we sometimes find *Marcus et Commodus* or *Marcus cum Commодо*: also, after their death, *divi Marcus et Commodus*.

180—192. [*M. Aurelius*] *Commodus [Antoninus]*, apparently only cited as *Commōdus*, or, after his death, *divus Commodus*.

I should here add two more Emperors who unworthily bore the honoured name of Antoninus. Bassianus, the son of Septimius Severus (generally known to moderns as Caracalla), was called by his father, on creating him Caesar, in

<sup>84</sup> For Minicius see Karlowa, i. 701: Teuffel, ii. § 342, 6, p. 185.

196, M. Aurelius Antoninus. From this time date Rescripts of **Severus et Antoninus**<sup>85</sup>: afterwards, as usual, **divi. Caracalla** alone, 211—217 A.D., is **Antoninus**, or, after his death, **divus Antoninus** and **divus magnus Antoninus**. He is the **Imperator Antoninus** of the universal grant of citizenship, 212 A.D.<sup>86</sup>, which was wrongly attributed by Justinian (Nov. 78. 5) to Pius.

There is still a lower deep. A second Bassianus, the son of Julia Soemias, being represented by his mother, and grandmother Julia Maesa, to be the son of Caracalla, was accordingly styled **M. Aurelius Antoninus**, and became Emperor in 218 A.D., under that name, which appears, with the occasional addition of Pius, on his coins. If any legal ordinances or rescripts can be with confidence attributed to this Emperor, his style is Antoninus. He is generally known, from his priesthood of the sun, by the name of Elagabalus or Heliogabalus<sup>87</sup>.

The principal names in the period at present under consideration are those of Pomponius, Julian, Africanus and Gaius. [**Sextus**] **Pomponius**, the author of the *Enchiridium* (above, § 3, p. 70), more often known simply as Pomponius<sup>88</sup>, must have been one of the most voluminous writers of his time. He would appear to have been still discussing legal questions in his 78th year, though some take the passage referred to as the words rather of a correspondent. What is certain is that the book from which it comes, the *Epistolae*, was written after the death of Pius, 161 A.D.<sup>89</sup> Pomponius'

<sup>85</sup> See Clinton, F. R. i. pp. 198 &c.

<sup>86</sup> Dig. 1. 5. 17.

<sup>87</sup> Cod. 2. 19. 8, 218 A.D., is called by Clinton a law of Elagabalus, F. R. i. 230. I have followed this author's spelling of the name, which is that of Gibbon, and Cohen, after Διο (Xiph. 79. 11, 12 Ἐλεγάβαλος; Zonaras, 12. 14 Ἐλεγάβαλος). Lampridius calls him Heliogabalus.

<sup>88</sup> *Sextus* alone is most probably Africanus (Karlowa, i. 716).

<sup>89</sup> See Dig. 40. 5. 20. The view preferred above is Teuffel's, ii. § 350, 6, p. 207. *Contra*, however, Karlowa, i. 716 and Roby, Int. clxxii. For the

*ad Plautium* has also been assigned to the same late date. On the other hand, the *Enchiridium* was written under Hadrian, probably before the compilation of Julian's Edict, and the 35 Books *ad Sabinum* seem, in part at least, to have preceded Julian's *Digesta*<sup>90</sup>.

Most of the other works of Pomponius, including 79 Books, at least, *ad Edictum*, and 41, at least, of *variae lectiones*, may be placed generally in the reign of Pius. Pomponius on the Edict is *not* directly quoted in the Digest<sup>91</sup>. This is probably due, as Karlowa suggests, to the fact of his Commentary having been incorporated, as to all passages of practical utility, in the later ones of Ulpian and Paulus, excerpts from which constitute about a fourth of the whole collection.

[Salvius] Julianus, the great-grandfather of the unfortunate *roi fainéant* Didius, was, according to Spartianus' life of that Emperor, twice Consul, and also filled the post of *Praefectus Urbi*, but the dates cannot be determined<sup>92</sup>. He comes, as a chief of the Sabinian school, at the end of Pomponius' *Enchiridium*<sup>93</sup>; but no mention is made of the Edict, which must presumably have been drawn up subsequently to Pomponius' historical sketch. That work of Julian was done under Hadrian (to whose legal Council he

date of the *Epistolae* see Dig. 50. 12. 14, *divus Antoninus*. As to that of the *ad Plautium* or *ex Plautio* see Krüger, 233, n. 1 and Karlowa, i. 717.

<sup>90</sup> For the *Enchiridium* see Dig. 1. 2. 2. 49, *Optimus princeps Hadrianus*. As to this date for the *ad Sabinum* see Lenel, Pal. ii. 86, n. 6, and below, p. 119.

<sup>91</sup> For the extent of Pomponius, *ad Edictum*, Dig. 37. 6. 1. 9, *libro septuagesimo nono*; of the *lectiones*, Dig. 8. 5. 8. 6, *libro quadragensimo primo*. The latter work is often, perhaps accidentally, connected with the *Epistolae*. For the suggestion that a combined abridgement of the two may have been used in Justinian's time, and recognised by his compilers, see Karlowa, i. 718: Krüger, 233, nn. 3, 6. For the probability that the *ad Edictum* was written after the Digest of Julian see Lenel, Pal. ii. 15, n. 1.

<sup>92</sup> Spartianus, *Vita Did.* Jul. 1.

<sup>93</sup> Dig. 1. 2. 2. 53.



belonged<sup>94</sup>), according to Jerome's Chronicle of Eusebius, in 131 A.D. His other principal work, the *Digesta*, in 90 Books, would seem to have been published in portions. The 6th Book must have preceded the *Senatus Consultum Juventianum* of 129 A.D.; the 27th must have similarly preceded an undated rescript of Hadrian, and therefore his death in 138<sup>95</sup>. On the other hand the 64th cites a rescript of *Imperator Titus Antoninus*, shewing that Julian was writing under Pius<sup>96</sup>. Whether he survived that Emperor is not certain. He is spoken of by Marcus and Verus in terms of high honour, but scarcely as a living authority<sup>97</sup>. We may perhaps take it that he was dead before the end of their joint reign, 169 A.D. It would seem, as has been said above, that some part of Pomponius' *ad Sabinum* preceded Julian's *Digesta* in general, but I do not think much more can be affirmed with confidence than that, as to their earlier works, the two authors were known to one another<sup>98</sup>.

It is unnecessary to quote testimonies to the great ability and high estimate of Julian, which probably led to the ultimate triumph of the Sabinian school<sup>99</sup>.

[*Sex. Caecilius*] *Africanus* the interlocutor to whom, in *Aulus Gellius*, 20. 1, we owe great part of our knowledge of the Twelve Tables, was evidently a younger contemporary and close follower of Julian. His *Quaestiones* are apparently word for word opinions of that Jurist, with occasional notes of dissent or modification by the editor<sup>100</sup>. The *Epistolae*

<sup>94</sup> *Spartianus*, *Vita Had.* 18.

<sup>95</sup> See as to the former date *Krüger*, 224, n. 2; as to the latter, *Dig.* 38. 2. 22.

<sup>96</sup> *Dig.* 4. 2. 18.

<sup>97</sup> *Dig.* 37. 14. 17 pr. Fitting takes the 64th Book as written in the "last years of Pius." See *Karlowa*, i. 711.

<sup>98</sup> For closer comparisons see *Krüger*, 224, n. 6 and 232, n. 5.

<sup>99</sup> See *Karlowa*, i. 709 and below, p. 128.

<sup>100</sup> See *Dig.* 30. 110; 19. 2. 35. 1, and *Karlowa*, i. 714. See too *Roby*, *Int.* cxxi.

mentioned in Dig. 30. 39 pr. would seem to be a separate work. In that passage "*apud Julianum*" is rightly explained by Karlowa to mean "commenting on Julian." The Quaestiones would seem to have been written after Julian's compilation of the Edict, perhaps after his death<sup>101</sup>. Africanus was apparently dead when Aulus Gellius completed his Attic Nights<sup>102</sup>, 169—175 A.D. (see above, § 5, p. 93).

Some half-dozen comparatively unimportant Jurists of about the same time may here be mentioned.

**Aburnius Valens** is inferred, from a nominal Praefecture of the City, *feriarum Latinarum causa*, held by him in 118 A.D., to have been born about 100<sup>103</sup>, being probably a little younger than Julian, with whom he is coupled by Pomponius as a pupil of Javolenus. As the inscription, on which the above inference rests, gives him the name *inter alia* of L. *Fulvius*, Fulvius is proposed by Mommsen to be read for the *Salvius* Valens stated by Capitolinus to have been one of Pius' Council, together with Vindius Verus, Volusius Maecianus, Ulpius Marcellus, and the doubtful Diavolenus<sup>104</sup>.

Of Vindius [Verus] little more is known than the above, and that he was Consul with **Pactumeius Clemens** in 138<sup>105</sup>. The latter was in practice as a Jurisconsult, if not a Councillor, under the Emperor Pius. In the passage referred to<sup>106</sup> he seems to be spoken of as then dead ("*aiēbat*"); the book from which the extract comes being Pomponius' *ex Plautio*, which, as we have seen (above, n. 89), may have been published at the beginning of the reign of Marcus and Verus, 161 A.D.

<sup>101</sup> See Krüger, 238, nn. 1, 2.

<sup>102</sup> Sextus Caecilius...illustris fuit. A. G. 20. § 1.

<sup>103</sup> See Karlowa, i. 710: Roby, Int. clxviii.

<sup>104</sup> Capitolinus, Vita Ant. P. 12. 1. As to Diavolenus see above, n. 76.

<sup>105</sup> C. I. L. iii. 879.

<sup>106</sup> Dig. 40. 7. 21. 1. See Karlowa, i. 717.

Pactumeius is to be distinguished from **Terentius Clemens**, whose only work directly quoted in the Digest—the *ad leges* or *ad legem Juliam et Papiam*—bears indications of publication about the same time as that just mentioned<sup>107</sup>.

Here too comes **Junius Mauricianus**, who wrote after Hadrian's death and under Antoninus, i.e. Pius<sup>108</sup>. There seems no MS. authority for altering the *Junium Mauricum* of a rescript from this Emperor (Dig. 36. 3. 1. 11) to Mauricianum, but the suggestion is certainly tempting.

Possibly a year or two later comes **Venuleius [Saturninus]**, who wrote after Hadrian's death in 138 A.D.<sup>109</sup> Julian is, according to Krüger, the latest author quoted by this writer; on the other hand he is placed *after* Gaius by the Florentine list, which seems, except as to Julian and Papinian, to follow roughly the order of time. The same list attributes to Venuleius not only a book *de officio proconsulis* but one *de poenis paganorum*. These works are cited in Dig. 48. 19. 15 and 16 as from Venuleius and *Claudius* Saturninus respectively. A *Claudius* Saturninus received two rescripts from the Emperor Pius—in one case together with a colleague Faustinus<sup>110</sup>—and was Praetor under Marcus and Verus, 161—169 A.D.<sup>111</sup> There is also a *Quintus* Saturninus, so quoted by Ulpian, and elsewhere as *Quintus* only, commenting in this passage on Labeo<sup>112</sup>; which last is probably, from similarity of subject-matter, the *Saturninus* quoted by the late Jurist Modestinus<sup>113</sup>. Finally, the Vatican frag-

<sup>107</sup> See Karlowa, i. 711, "Sub Antonino Pio," Lenel, Pal. ii. 335, n. 1.

<sup>108</sup> Dig. 31. 57: 33. 2. 23.

<sup>109</sup> Dig. 48. 2. 12. 1.

<sup>110</sup> Dig. 20. 3. 1. 2: 50. 7. 5 pr. The two look like a pair of Consuls, whom however I cannot trace. As to the late Consular Jurisdiction see Mommsen, S. R. ii. 104—6.

<sup>111</sup> Dig. 17. 1. 6. 7.

<sup>112</sup> Dig. 34. 2. 19. 7: 12. 2. 13. 5: 4. 3. 7. 7.

<sup>113</sup> Dig. 48. 3. 14. 7.

ments inform us of a Claudius Saturninus, governor of the Belgic province under Hadrian<sup>114</sup>.

Fitting identifies Venuleius and Claudius Saturninus, but separates Quintus: Karlowa, with whom I myself agree, believes all three to be one person, Quintus Claudius Venuleius Saturninus<sup>115</sup>. The strongest argument against this, the two references in Dig. 48. 19, may be met by supposing that the *titles* of the two books are cited, and that an author does not always put his whole style in the title of all his works. Both books, too, are attributed to Venuleius by the Florentine list of authors. For the rest, there is no difficulty in the same man governing a province under Hadrian, holding some office under Pius, and being Praetor under Marcus and Verus.

[L. Volusius] Maecianus was, as we have seen (above, p. 120), one of the advisers selected by Pius, under whom he wrote his *Fideicommissa* and *ex lege Rhodia*<sup>116</sup>. He was the instructor in law of the Emperor Marcus, then Caesar, between 143 and 146 A.D.<sup>117</sup>, and is spoken of in a rescript of Marcus and Verus—therefore between 161 and 169—not only as one of their advisers on *jus civile*, but as a personal friend<sup>118</sup>. Nevertheless he took part in the insurrection of Avidius Cassius, 175 A.D., and was killed on its suppression, though without either the wish or knowledge of the merciful Marcus Aurelius<sup>119</sup>.

[Ulpian] Marcellus, also among the legal advisers of Pius, held the same position with his successors. Under

<sup>114</sup> Vat. Fr. 223, Epistula divi Hadriani quam scripsit Claudio Saturnino legato Belgicae.

<sup>115</sup> Karlowa, i. 730, and Lenel, Pal. ii. 1207, n. 1. *Contra*, Teuffel, ii. § 360, 6, 7, p. 224. See too Roby, Int. clxxxiv.

<sup>116</sup> Dig. 40. 5. 42 pr.: 14. 2. 9.

<sup>117</sup> See Capitolinus, Vita M. Ant. Phil. 3. 6, and Krüger, 242, n. 3.

<sup>118</sup> Dig. 37. 14. 17 pr.

<sup>119</sup> "Invito atque ignorante Antonino." See Capitolinus, Vita M. Ant. Phil. 25. 4: Vulcacius, Vita Avid. Cass. 7. 4.

M. Aurelius at least ("Antoninus Augustus") he took a principal part in a case decided 166 A.D.<sup>120</sup> This case being recorded in the 29th Book of Marcellus' *Digesta* as having recently (*proxime*) occurred, and the whole number of books being according to the Florentine Index 31, it has been concluded that the work in question was finished shortly after 166<sup>121</sup>. It was possibly begun after the death of Pius, who is called *divus* in Book 3<sup>122</sup>. No other work of Marcellus can be dated. He may have been the Imperial Legate of Lower Pannonia, L. Ulpius Marcellus, recorded in an inscription (C. I. L. iii. 3307), but he can scarcely, I think, have been the soldier Marcellus Ulpius described in such detail by Dio, as sent out to Britain by Commodus, who, in 184 A.D., just escaped being put to death by that Emperor for his military success or other virtues<sup>123</sup>. For his mention in the law of Citations, see below, p. 128.

Papirius Justus appears to have made the first collection of Imperial decrees or ordinances, in his twenty Books of *Constitutiones*. These are generally supposed to have been written under Commodus (180—193), although the expressions *Imperator Antoninus*, *Imperatores Antoninus et Verus*, &c. might seem to place them earlier. Of Papirius Fronto we only know that he was possibly a contemporary of Scaevola<sup>124</sup>.

Tarruntenus Paternus, who wrote, to judge from the extracts and title of his work (*de re militari*), simply on army practice and regulations, was secretary to Marcus, and employed by him in an unsuccessful military expedition,

<sup>120</sup> Dig. 28. 4. 3.

<sup>121</sup> See Teuffel, ii. § 360, 9, p. 225, and Karlowa, i. 731.

<sup>122</sup> Dig. 4. 1. 7 pr.

<sup>123</sup> Dio (and Xiphilinus) 72. 8. Karlowa thinks them the same, i. 731. *Contra* Mommsen and Roby, Int. clxxxv.

<sup>124</sup> As to Justus Dig. 50. 8. 11—13: Karlowa, i. 731. See above, p. 101. As to Fronto see Dig. 30. 114. 7 and Lenel, Pal. i. 947, n. 1.

apparently about 174 A.D., at which time he is supposed by some to have been made *Praefectus Praetorio*<sup>125</sup>, a position which he certainly attained at some time in Marcus' reign. Being subsequently sent with a large force against the Marcomanni, he gained a decisive victory over the enemy in 179<sup>126</sup>. He was put to death by Commodus, on suspicion of connexion with the conspiracy of Lucilla, in 183, having been, since the previous reign, head of the Praetorian guards<sup>127</sup>.

**Gaius.** A somewhat longer notice may be given to the one Jurist from whom we have a considerable book, in almost its original condition, but of whom we know, as of our own Shakespeare, so remarkably little.

Gaius—no other name recorded—was living in the time of Hadrian, before whom an Alexandrian woman, the mother of five children at a birth, was brought *nostra aetate*<sup>128</sup>. (This may have been in the year 130 when Hadrian was in Egypt<sup>129</sup>; see however below, p. 126.) He wrote, perhaps first, on the *Edictum provinciale*, a work in 32 Books; on the *Edictum Praetoris Urbani*, a number of separate Titles, whether originally arranged in Books is doubtful<sup>130</sup>; and a compilation from the writings of Q. Mucius. Reference is made to these works, at least to the two last, in the first Book of the "Institutes"<sup>131</sup>. Whether the six *libri ad legem XII tabularum*, which are quoted in the Digest, must not have preceded or accompanied the old civil law as treated in

<sup>125</sup> Dio Cassius, 71. 12. See Krüger, 258.

<sup>126</sup> Dio (or rather Xiphilinus) calls the rising τὰ Σκυθικά, 71. 33. See Clinton, F. R. i. 176.

<sup>127</sup> Dio, 72. 5: Lampridius, vita Comm. 4. 1, 7: 14. 8.

<sup>128</sup> Dig. 34. 5. 7 pr.

<sup>129</sup> See Clinton, F. R. i. 116.

<sup>130</sup> See Karlowa, i. 722 and Roby, clxxxii. On the other hand Dig. 34. 4. 5 and Lenel, Pal. i. 184, n. 2. The latter dates this work, by Dig. 30. 73. 1, under Pius, to whose reign Fitting also assigns the *ad edictum provinciale*, ib. 182, n. 1, 189, n. 1.

<sup>131</sup> Ga. 1. 188.

the *libri ex Q. Mucio* may be questioned. Of the Institutes, Gaius' best known work—more correctly "Institutions"—the first Book and part of the second appear to have been written under Pius (138—161 A.D.), perhaps towards the end of his reign. That Emperor appears simply as *Imperator* (by the side of *divus* Hadrianus) in 1. 53, 55; 2. 151 <sup>a</sup><sup>132</sup>; whereas in 2. 195 we find *divus Pius Antoninus*. It has been supposed that a special treatise on *bonorum possessio* in Inheritance is referred to in 3. 33, but it is not impossible that the reference may really be to a Title in the work on the Edict. There is more reason for supposing that 3. 54 (cf. 3. 52) refers to a separate work on the *lex Julia et Papia* (otherwise *ad leges*), which may have been written contemporaneously with the Institutes. The 14th, out of its 15 Books, we know to have been written after the death of Pius<sup>133</sup>.

The *Regulae* of Gaius must come after the first part at least of the Institutes, for the possibility of *arrogatio* of women could scarcely have been ignored even in an elementary treatise<sup>134</sup>. His *Res quotidianae* ("everyday matters"), called also, possibly by later admirers<sup>135</sup>, *Aurea*, apparently followed the plan of the Institutes, but entered into more detail, as for practitioners, or at least more advanced students, rather than for beginners. The work may however have been merely the development of the original treatise, to which it was most probably posterior<sup>136</sup>. A progress, for instance, in the theory of Specification may be remarked between the Institutes, 2. 79, and the extracts from the *Quotidianae* in Dig. 41. 1. 7. 7. The latter work is the source of much of the additional matter in Justinian's Institutes, as compared with those of Gaius. Thus in Dig. 41. 1

<sup>132</sup> That this is Pius is shewn by Dig. 28. 4. 3. See Karlowa, i. 727.

<sup>133</sup> Dig. 31. 56. See Krüger, 245. 2, and 248.

<sup>134</sup> Cf. Dig. 1. 7. 21 with Ga. 1. 101.

<sup>135</sup> See Krüger, 245. 4: Lenel, Pal. i. 251, n. 3.

<sup>136</sup> See Krüger, 254: Karlowa, i. 725.

just referred to, the extracts 1—9, which are almost entirely from Gaius' *Aurea*, form the main part of Inst. §. 1. 11—34.

Of Gaius' other works we only know for certain that the two Books of his *Fideicommissa* were written after the death of Pius, *divus Antoninus* occurring in both<sup>137</sup>; and that he must have written his single volume on the *Senatus Consultum Orphitianum* as late as A.D. 178, when that law was passed<sup>138</sup>. In a quotation from that book Gaius speaks of *sacratissimus princeps noster*, a title most suitable certainly to Marcus. But as the reference is to the *Oratio* introducing the *Senatus Consultum*, which is attributed by Ulpian to *Imperatores Antoninus et Commodus*, it is possible that Gaius lived on till the reign of the latter (180—192) and wrote this last work under him<sup>139</sup>.

This is not the place for the interesting but somewhat futile discussion as to the *nationality* of Gaius. On other points, it certainly seems to me that he was rather a teacher and writer in Law than a practitioner, and that he undoubtedly had *not* the *jus respondendi* claimed for him by Huschke<sup>140</sup>, as against a general *consensus* of later writers.

*Laelius*, probably identical with the *Laelius Felix* of Gellius, to whom we owe valuable information about *comitia calata* and *concilia* (A. G. 15. 27), though he is only little quoted and at second hand in the Digest, must have been a contemporary of Gaius, whose Alexandrian prodigy he saw, on her arrival at Rome<sup>141</sup>.

In the period at which we are now arriving, we do not seem to hear much of writers belonging to one or other

<sup>137</sup> D. 35. 1. 90: 32. 96: 36. 1. 65. 5.

<sup>138</sup> Just. 3. 4 pr.

<sup>139</sup> Gaius, Dig. 38. 17. 9: Ulpian, Regg. 26. 7. See however Krüger, 243, n. 4.

<sup>140</sup> Karlowa, i. 723: Huschke, Praef. ad G. p. 9: *Contra*, Teuffel, ii. § 361, 8, p. 229: Krüger, 254, n. 4: Karlowa, i. 721: also Clark, P. J. 298.

<sup>141</sup> Dig. 5. 4. 3. This is rather against the date (180) suggested above, p. 124.



of the two Schools, so frequently mentioned in Gaius' Institutes. This is, in the opinion of Karlowa, a consequence *inter alia* of the great reputation and predominant influence of Julian, after whose time "all became Sabinian, and the Proculians died out"<sup>142</sup>. That view is, as we shall see, somewhat supported by the selection of older authors for special observance in the *lex citationum*. See below, p. 128.

Last comes for mention an author of considerable importance, and liable, from his style of citation, to cause some confusion. [*Q. Cervidius*] *Scaevola*<sup>143</sup> is almost always the Jurist intended where the bare name of *Scaevola* is used; the republican Jurist is known as *Q. Mucius*. This *Scaevola* was the principal legal adviser of Marcus<sup>144</sup>; and forms an interesting connecting link with the next great group of Jurists, from the fact that Paulus was probably his pupil<sup>145</sup> and Papinian a sort of under-lecturer to him<sup>146</sup>. *Scaevola* can, in fact, be traced so late, particularly as to his *Responsa*, that he can scarcely be supposed to have written that work under Pius, and the citation *Imperator Antoninus Pius libertis Sextiae Basiliae*<sup>147</sup> is most probably one of those

<sup>142</sup> Karlowa, i. 709.

<sup>143</sup> The full name seems correct, though it is considered to be due to a gloss in Dig. 28. 6. 38. 3. See Krüger, 258, n. 10. *Κερβίδιος* comes in Modestinus, Dig. 27. 1. 13. 2.

<sup>144</sup> So Capitolinus, Vita M. Ant. Phil. 11. 10. Dig. 36. 1. 23 pr., it is true, only mentions him as being *in auditorio*, but Krüger's question (259, n. 1) whether *Scaevola* was Councillor or Functionary (?) seems rather gratuitous.

<sup>145</sup> See Dig. 28. 2. 19. Tryphoninus is added, as a pupil of *Scaevola*, but Ulpian rightly questioned, by Krüger, 259, n. 2.

<sup>146</sup> On the words *sub Scaevola professum* see Roby, cxc. For a slightly different view, Karlowa, i. 734. The sentence in which they occur (Spartianus, Vita Ant. Carac. 8. 3) is rejected by Mommsen (see Krüger, 259, n. 2). See however, as to the value of the ms. from which it comes, Peter's Praef. to Scriptorum Hist. Aug. p. vi3 n. 3.

<sup>147</sup> Dig. 34. 1. 13. 1, *Scaevola libro quarto responsorum*. There were 40 Books. See on this passage Karlowa, i. 733 following Fitting, and Teuffel, ii. § 369, 1, p. 249.

literal quotations of official style to which reference has been made above (p. 101).

The *Digesta*, which appear to be the earliest of his works quoted to any extent in the Digest of Justinian, were begun under Marcus and Verus<sup>148</sup>, and probably finished in the reign either of Marcus alone, 169—176, or of Marcus associated with Commodus, 176—180<sup>149</sup>. Of the *Quaestiones*, the 14th out of the 20 Books was written after Marcus' death<sup>150</sup>. The whole work is generally attributed to the reign of Commodus, extending perhaps a little later<sup>151</sup>. The *Responsa* contain, in the 2nd out of the 6 Books, one fairly certain indication of having been written under, or after, the reign of Severus, in a *style* introduced by that Emperor<sup>152</sup>.

With reference to the supposed dying out of the Proculian school mentioned above (p. 119), the prominence given to the Sabinians, in the older Jurists selected by the Law of Citations, 426 A.D.<sup>153</sup>, may be noted. Gaius is mainly Sabinian (above, p. 109), Julian a chief of the school (above, p. 118). The others are Sabinus himself, Marcellus and Scaevola. We cannot positively assign Marcellus to one school or the other: the authors cited principally by him—

<sup>148</sup> Dig. 2. 15. 3 pr., Scaevola libro primo digestorum. Imperatores Antoninus et Verus ita rescripserunt. Note the difference from the inscription cited above, in the text.

<sup>149</sup> So Lenel, Pal. ii. 215, n. 1: Krüger, 260, n. 1, and perhaps Karlowa, i. 733. There are, however, passages such as *Imperator noster divus Marcus*, Dig. 32. 39 pr. (*libro vicesimo digestorum*), and the reference to Setum Orphitianum (*libro nono*), Dig. 22. 3. 29. 1, which, unless somewhat arbitrarily explained away, would put three-quarters of this book as late as Commodus. Mommsen's dating of it under Alexander Severus however seems untenable (Roby, clxxxviii.).

<sup>150</sup> Dig. 4. 4. 11. 1. Lenel comparing Cod. 4. 57. 2, 3 (Pal. ii. 271, n. 2), thinks possibly under Marcus and Commodus.

<sup>151</sup> Karlowa, i. 733: Krüger, 262, n. 7.

<sup>152</sup> *Praefectus legionis*, Dig. 26. 7. 47. 4. The reference in Dig. 44. 4. 17. 1 to the *Oratio Severi* of 195 A.D. (see Dig. 27. 9. 1) is not clear to me. But see Krüger, 261, n. 3, and Lenel, Pal. ii. 287, n. 6.

<sup>153</sup> Cod. Th. 1. 4. 3.

Sabinus, Cassius, Julian, Aristo, Neratius—are for the major part Sabinian. I am inclined to infer that Scaevola's views were on the whole those of that school, from an interesting passage in his *Quaestiones*<sup>154</sup>, though he actually there sides with Proculus. But the eclectic character of the passage, and the rarity with which Scaevola refers to the school controversies, point to their dying out.

**Jurists.** (4) Under **Septimius Severus, Caracalla and Alexander Severus**. 193—235 A.D. The juridical activity of the principal contributors to the Digest belongs to this period, or rather to about 40 years of it, for not much can be referred certainly to the reign of Elagabalus. The dates in detail are: **Severus**, 193—196; **Severus with Caracalla (Severus et Antoninus)**, 196—211; **Caracalla alone (Antoninus)**, 211—217; **Elagabalus (Antoninus)**, 218—222; **M. Aurelius Severus Alexander (Alexander)**, 222—235. (See above, pp. 116, 117.)

[**Aemilius**] **Papinianus** was the intimate friend, and connexion by marriage, of the Emperor **Septimius Severus**, under whom he became *Magister libellorum*<sup>155</sup>, probably on **Severus'** accession in 193 A.D., and *Praefectus Praetorio* in 203. After the demise of his patron he himself was put to death by **Caracalla**, "because he refused to justify the latter's murder of his brother **Geta**" (so **Spartianus**).

The most important work of **Papinian**—the 37 Books of *Quaestiones*—must, apparently belong to the sole reign of **Severus**, 193—196, who is continually called therein *optimus* or *noster Imperator*. We also find in the same work *Imperator Antoninus* or *Marcus* with no *divus* added<sup>156</sup>.

<sup>154</sup> Dig. 29. 7. 14 pr.

<sup>155</sup> For the probable functions of this office, and the facts of **Papinian's** life generally, see my article on **Papinian**, *Journ. Comp. Leg. N. S.* ix. 11—30, and generally **Krüger**, 263, 4: **Teuffel**, ii. § 371, pp. 252—4: **Roby**, xcxi.—xcxiii. For the later functions of *Praefectus Praetorio*, below, p. 131.

<sup>156</sup> Dig. 22. 1. 6, from Book 29: 31. 67. 9, 10, from Book 19, &c.

These passages cannot possibly have been written in the reigns of those earlier Emperors, and, in fact, the style of consecration for both Marcus and Commodus does occur in an earlier Book of the *Quaestiones*<sup>157</sup>. The occasional omission may possibly be, as Mommsen suggests, a slight provincialism of Papinian, possibly an incomer from Syria, in his earlier writings. There certainly seems no clear ground to believe that any part of the *Quaestiones* was written before the reign of Severus.

In Papinian's next work of principal importance, the 19 Books of *Responsa*, we read first of *optimi maximeque principes nostri*<sup>158</sup>, *maximi principes nostri*<sup>159</sup>, but, in the 15th Book, of *divus Severus*<sup>160</sup>, who died 211 A.D. Book 4, on the other hand, we know to have been written after an Oratio delivered by Caracalla in 206<sup>161</sup>. The entire work therefore belongs partly to the joint reign of Severus and his son, partly to the sole reign of the latter.

There is a very interesting passage (Dig. 43. 10) from Papinian's "odd volume on town government," *ἀστυνομικὸς μόνόβιβλος*, somewhat positively entitled by Karlowa *de officio aedilium curulium*<sup>162</sup>, written in so authoritative a tone that it might have proceeded from a high officer of state: this may, however, be merely due to the idiom and style of the language—Greek. The subject is apparently not so much the duties of *Roman* officials, as of the magistrates of *municipia* &c. The treatise in question has been connected with supposed early work of its author at Berytus, where he was probably once a lecturer<sup>163</sup>. But

<sup>157</sup> Dig. 31. 64, *divi Marcus et Commodus Imperatores*.

<sup>158</sup> Dig. 34. 9. 16. 1, from Book 8.

<sup>159</sup> From Book 12, Frag. Vat. 294. If this goes with the next fragment, 295, it is dated, by Consuls, 210 A.D.

<sup>160</sup> Dig. 34. 9. 18 pr.

<sup>161</sup> Dig. 24. 1. 32 pr., 16.

<sup>162</sup> Karlowa, i. 737. See, for the origin of this idea, Krüger, 267, n. 2.

<sup>163</sup> The duties are simply those of road surveyors in this passage. See

this is mere surmise: in fact none of the works of Papinian, but those mentioned above, can be particularly dated with any confidence.

Two Jurists may be mentioned here, both quoted directly in the Digest, but of very different degrees of interest<sup>164</sup>. **Arrius Menander** wrote his *de re militari* under the joint reign of Severus and Caracalla. To the same time, or perhaps in part to the sole reign of Severus, belong the *Quaestiones* and the *de castrensi peculio* of **Tertullian**, whom it is tempting to identify with the famous Q. Septimius Florens, the presbyter of Carthage. The latter was certainly a contemporary, and well acquainted with Roman Law: nor do the discrepancies of style appear to be more than can be accounted for by the *fervor theologicus*.

[**Julius**] **Paulus** apparently studied, like Papinian, under Scaevola<sup>165</sup>, and no doubt practised as an advocate<sup>166</sup>. We do not hear of his *professio*, or public teaching, and it has been suggested that he may have continued his studies under that of Papinian<sup>167</sup>. This is a misunderstanding, as the passage in question clearly refers to the official *auditorium* of Papinian as *Praefectus Praetorio*. The reference of a question of Contract Law to an officer originally military seems strange; but it appears that appeals in civil matters had, in the time of Severus, begun to be brought before the "Captain of the Guard," as representative or delegate of the highest court, civil or criminal—the Emperor<sup>168</sup>.

Mommsen, Sr. ii. 498. 1: also Roby, cxcvi. and my article referred to in n. 155.

<sup>164</sup> As to Menander, Dig. 4. 4. 11. 2, see Karlowa, i. 739. Teuffel puts the work partly under Severus' sole reign, ii. § 372, 4, p. 255. As to Tertullian, see Karlowa, i. 739; Teuffel, ii. 372, 6, p. 255, who are for, and 270, n. 8, who is against, identification with the theologian.

<sup>165</sup> Dig. 28. 2. 19.

<sup>166</sup> Dig. 32. 78. 6.

<sup>167</sup> See Dig. 12. 1. 40 and Krüger, 272, n. 1.

<sup>168</sup> See Mommsen, Sr. ii. 987. This was so even before Papinian held the office. Dig. 22. 1. 3. 3.

Paulus, therefore, was an assessor to Papinian<sup>169</sup>; and also, whether as such or not, appears to have been on the Emperor's legal Council, together with Papinian and others<sup>170</sup>. After this Paulus, and Ulpian, who had served together with Paulus as Papinian's assessor, were promoted respectively to the offices *ad memoriam* (Roby, "Master of the Records") and *ad libellos* (above, n. 155); and from those offices, without any intermediate step<sup>171</sup>, to the Praefecture to which they had been previously assessors. Thus much seems clear: I also hold that the last-named appointments were at different times, for I find no clear proof of *Collegiate* Praefecti Praetorio. Paulus was possibly appointed first, either under Caracalla or Elagabalus, exiled by the latter, whether on repudiation of his first wife Julia Cornelia *Paula* or not<sup>172</sup>, and recalled by Alexander, 222 A.D.<sup>173</sup> But our authorities are poor and undecided. Whether both Jurists shared Ulpian's ultimate unpopularity and fate we do not know. Paulus quotes a rescript of Alex. Severus in the 14th of the 23 Books of his *Responsa*, but I see no ground for Karlowa's suggestion that he succeeded Ulpian on the murder of the latter, nor can any date, nearer than the reign of Alexander generally, be made out for the rescript above mentioned<sup>174</sup>.

<sup>169</sup> Dig. 29. 2. 97. See also below, note 171.

<sup>170</sup> Dig. 4. 4. 38 pr. : 49. 14. 50.

<sup>171</sup> This seems to be the meaning of *statim*—queried by Tenffel, ii. § 376, 1, p. 267—in the following passage. *Intimavit* (Pescennius) *ut assessores in quibus provinciis adsedissent, in his administrarent. quod postea Severus et deinceps multi tenuerunt, ut probant Pauli et Ulpiani praefecturae, qui Papiniano in consilio fuerunt ac postea cum unus ad memoriam, alter ad libellos paruisset, statim praefecti facti sunt.* Spartianus, *Vita Pesc. Nig.* 7. 3, 4.

<sup>172</sup> Dio Cassius (Xiph.), 79. 9. See Karlowa, i. 745. This would be in 219 or 220, if there is any connexion with the repudiation. See Clinton, *F. R. i.* 238.

<sup>173</sup> Aurelius Victor, *Cacsares*, 24. 6. See below, n. 187.

<sup>174</sup> Dig. 31. 87. 3. Karlowa (i. 745) does not, as Krüger (272, n. 5), make

Paulus is, next to Ulpian, the most voluminous contributor to the Digest. We owe to him a considerable part of our remains of Labeo (above, p. 113), upon whom he occasionally comments with considerable freedom<sup>175</sup>: he was also an epitomiser, and so a preserver, of some work from the earlier Alfenus (above, p. 106). But we have now to deal with his more original works, for which unfortunately in most cases no very definite dates can be confidently given.

Of his great commentary on the Edict (78 Books), a large part has been attributed by Fitting to the reign of Commodus, and the whole to some time before the Oratio Severi of 195. On the other hand, the mention of the late Jurist Marcianus (see below, p. 141) in the 75th Book might be supposed to bring down the end, at least, of the work to the reign of Elagabalus or Alexander<sup>176</sup>. I should myself incline to the latter view, as I cannot find any clear evidence of literary work by Paulus before the reign of Severus. Allowing that Marcianus, in the passage above referred to, might be explained away into the earlier *Maecianus* (above, p. 122), we find, on the other hand, references, in the 13th Book in particular<sup>177</sup>, to a sole Emperor *Antoninus*, which seem much more suitable for Caracalla than for Commodus. To the reign of the former, therefore, and one if not two of his successors, the *ad edictum* of Paulus seems to belong. His next most important work, the Commentary on Sabinus, must have been written, so far as 7 out of the 16 Books,

Paulus and Ulpian colleagues in the Praefecture, though he recognises such a collegiality, of Flavianus and Chrestus, as existing at the beginning of Alexander's reign. (See Dio, 80. 2: Zosimus, 1. 11.) Lenel, Pal. i. 951, agrees with Karlowa in making Paulus Praef. Praet. under Alexander.

<sup>175</sup> E.g. Dig. 41. 1. 65, &c. See Krüger, 273.

<sup>176</sup> Dig. 7. 9. 8. See Karlowa, i. 749, 750: Roby, Int. cciii.

<sup>177</sup> Dig. 4. 8. 32. 14. See generally Karlowa, i. 749, 750, whose view, mainly that of Mommsen, I follow. So too Teuffel, ii. § 377, 2, p. 270. *Contra*, I think, Krüger, 275; and Lenel, who attributes the *ad edictum*, though with a query, to the time before Severus' accession.

before the Oratio of 206 A.D., dated by Ulpian<sup>178</sup>. Lenel puts the whole work under the sole reign of Severus, 193—196 A.D., as also does Krüger, "au plus tard"<sup>179</sup>.

The interesting collection of *Decreta*, the three Books of which appear to have formed part of a larger work of Imperial rehearings<sup>180</sup>, must have been completed before the death of Severus. The work is usually attributed to the joint reign of that Emperor and Caracalla (196—211 A.D.), who appear as *Imperatores nostri*<sup>181</sup>: we also hear of *Severus Augustus*, and a single *Imperator*<sup>182</sup>, so that the notes may have been begun in his sole reign. The majority of Paulus' other works may be attributed to the joint reign above-mentioned or the sole reign of Caracalla, 211—217. A few, e.g. *de adulteriis* and *de jure libellorum*, are believed, on account of the term *magnus Antoninus*, &c.<sup>183</sup>, to come after Caracalla's death, while one or two, e.g. the *de censibus* and the 23 Books of *Responsa*, definitely refer to Elagabalus, the latter work also extending into the reign of Alexander<sup>184</sup>.

Of the *Sententiae ad filium* by Paulus, one of the few juristic works which have come down to us *in extenso*, we can only say that it must have been written *after* the authorisation, in 206 A.D., of gifts between husband and wife, and *before* Caracalla's general grant of citizenship<sup>185</sup>, whether that can be certainly dated 212 or only generally in that Emperor's reign<sup>186</sup>. On the persistent popularity of

<sup>178</sup> Dig. 24. 1. 32 pr. For points out of Paulus' 7th Book see 24, 26, 28 of the same Title.

<sup>179</sup> Lenel, Pal. ii. 1247; Krüger, 276.

<sup>180</sup> Dig. 28. 5. 93. See Krüger, 281, n. 4. Compare, on the other hand, Lenel, Pal. i. 961, n. 1; 959, n. 1; and 1111, n. 3.

<sup>181</sup> Dig. 28. 5. 93: 49. 14. 48 pr.

<sup>182</sup> Dig. 50. 2. 9 pr.: 36. 1. 74. 1: 29. 2. 97.

<sup>183</sup> Collatio, 4. 3. 6 (Coll. Aj. iii. 151): Dig. 50. 7. 12. 1.

<sup>184</sup> Dig. 50. 15. 8. 5, 6: Collatio, 10. 9, dated by Consuls 213 A.D.: Dig. 49. 1. 25.

<sup>185</sup> See Pauli, Sent. 2. 23. 5—7: 5. 22. 3, 4.

<sup>186</sup> See Dio Cassius, 77. 9; which is rather in favour of 212.



these *Sententiae*, and the abridged form in which they have come down to us, see Teuffel, ii. § 377. 3.

[Domitius] Ulpianus contributes more than a third of the whole Digest (Roby). His public career has been somewhat anticipated in speaking of that of Paulus (above, p. 131). It is not very easy to reconcile the somewhat precise account of Aurelius Victor with the hesitating one of Lampridius<sup>187</sup>. On the whole I am disposed to prefer the slightly later authority of Victor, and to suggest the following harmonisation.

Paulus was first appointed *Praefectus Praetorii*, from the office *ad memoriam*, whether by Caracalla or Elagabalus. By the latter he was exiled, Flavianus and Chrestus being appointed to the Praefecture in his place (see above, n. 174). He was recalled and held in high honour by Alexander, but not made *Praefectus* again.

Ulpian, who already held the office of *magister scrinii* or *ad libellos*<sup>188</sup>, may have been, while retaining that office, made a colleague of Paulus' two successors in the Praefecture, that office being irregularly put in commission; but was subsequently removed by Elagabalus<sup>189</sup>. On the accession of Alexander (222 A.D.) he was recalled, still retaining his office of *magister scrinii*, and being made, or remaining, one of the Emperor's legal advisers (*consiliarius*). He appears at once in that position, and in the important post

<sup>187</sup> Aur. Victor, *Caesares*, 24. 6, (Alexander) Domitium Ulpianum, quem Heliogabalus praetorianis praefecerat, eodem honore retinens Pauloque inter exordia patriae reddito iuris auctoribus quantus erga optimos atque aequi studio esset edocuit: Lampridius, *Vita Alex. Sev.* 26. 5, 6, Paulum et Ulpianum in magno honore habuit, quos praefectos ab Heliogabalo alii dicunt factos, alii ab ipso. nam et consiliarius Alexandri et magister scrinii Ulpianus fuisse perhibetur, qui tamen ambo assessores Papiniani fuisse dicuntur.

<sup>188</sup> Above, n. 171. This may have been either under Severus or Caracalla.

<sup>189</sup> Possibly expelled from Rome. Lampridius, *Vita Elag.* 16. 3, 4.

of *Praefectus Annonae* (practically Minister of the National Food Supply), in 222 A.D., the first year of Alexander's reign<sup>190</sup>. An undated rescript of the same Emperor describes him as *Praefectus Praetorio*<sup>191</sup>, to which office he was, according to Dio Cassius<sup>192</sup>, appointed by Alexander immediately on his accession, Flavianus and Chrestus being, by Ulpian's directions, put to death. He was Alexander's chief confidant, and, to all intents and purposes, Prime Minister<sup>193</sup>, till that relation was terminated by Ulpian's assassination or massacre at the hands of his own Praetorian subordinates (from whom the Emperor had more than once had to defend him), A.D. 228<sup>194</sup>. So ends the greatest of the Jurists.

As to the *order* of Ulpian's works, the inference *prima facie* drawn from the bare use of "*Imperator*" has been (above, p. 101) expressly disregarded, in his case, by Fitting, and implicitly by some others. A certain irregularity in this respect, which I think occurs mainly in the *ad edictum*, may possibly be explained by the commencement of that work in the time of Severus, and a subsequent retouching of its earlier part, with only a partial correction of the original Imperial style<sup>195</sup>. No work, as *published* by Ulpian, which has come down to us, can be confidently referred to the reign of Severus, sole or joint, except possibly the single book *de excusationibus*<sup>196</sup>.

<sup>190</sup> Cod. 8. 38. 4.

<sup>191</sup> Cod. 4. 65. 4.

<sup>192</sup> Dio (Xiph.), 80. 1, 2, *εἰς αὐτὴν ἀρχήν αὐτίκα κ.τ.λ.*

<sup>193</sup> Dio, l.c. and Lampridius, *Vita Alex.* 31. 2, 3.

<sup>194</sup> *Vita Alex.* 51. 4: Dio Cassius (Xiph.), 80. 2. As to the date, Clinton, *F. R. i.* 242, calls attention to a new *Praefectus Praetorio* in April 11, 228 A.D. See Cod. 5. 29. 3.

<sup>195</sup> See Krüger, 290, n. 1: Karlowa, i. 743.

<sup>196</sup> Teuffel, ii. § 376, 2, p. 268. Lenel, "inter 199 et 211," *Pal.* ii. 899. 1 and 1247. See *Vat. Frag.* 158, 159 for *Imperator Severus* and *Imperatores nostri*, with Mommsen's note (*Coll. Aj.* iii. p. 55), where he points out that 123—170 come bodily from Paulus' *de excusationibus*.

The Commentary on the Praetor's Edict, which is his greatest work (81 Books), contains, besides a certain number of conflicting Imperial styles (which cannot be accounted for by earlier or later Books), two or three direct references to dateable *Constitutiones*, e.g. in the 10th Book to a rescript of 212, mentioned again in the 26th as "recently passed"<sup>197</sup>. On the whole, the somewhat contradictory evidence on the subject seems best reconcileable with the view that the earlier Books, 1—50, may have been begun under Severus and carried on under Severus and Caracalla, but were not made up for publication till the sole reign of the latter; while the later Books appear to extend somewhat after Caracalla's death<sup>198</sup>. This is, with a slight modification<sup>199</sup>, the view of Lenel, who places the most of Ulpian's other works, including the 51 Books *ad Sabinum*, in Caracalla's sole reign. It is possible, however, that the last 8 Books belong to a later period; and probable, if, as Krüger thinks, the work remained unfinished<sup>200</sup>. In any case, there was, we know from Justinian's Constitution *de Emendatione Codicis*, a second edition of Ulpian's *ad Sabinum*<sup>201</sup>, which may have included an extension of the first. The 5 Books *de adulteriis*, which must be in part identical with the 2 *ad legem Juliam de adulteriis*<sup>202</sup>, belong to the time after Caracalla's death<sup>203</sup>; the 4 *de appellationibus* are attributed by Lenel, apparently on the ground of an ambiguous *Imperator*

<sup>197</sup> Dig. 3. 6. 1. 3: 12. 5. 2. 2. See Cod. 7. 49. 1.

<sup>198</sup> See Lenel, ii. 422, n. 2: Karlowa, i. 743. Krüger, 289, and Teuffel, ii. § 376, 2, p. 268, make the whole published under Caracalla.

<sup>199</sup> See Roby, Int. excix., cc. on Fitting's assignment, which is generally followed by Lenel.

<sup>200</sup> Krüger, 292. *Imperator Antoninus (Caracalla) cum divo patre* from Book 43 (Dig. 12. 6. 23. 1: 46. 3. 5. 2) seems the latest definite indication of date.

<sup>201</sup> Const. Cordi, § 3.

<sup>202</sup> Krüger, 293, n. 6.

<sup>203</sup> Dig. 48. 5. 14. 3, *divi Severus et Antoninus*. Karlowa's suggested *divus* is perfectly gratuitous and inconsistent with his own objection elsewhere to the same phrase (i. 744, 750).

*noster Antoninus*<sup>204</sup>, to the reign of either Caracalla or Elagabalus. I know of nothing which can be placed in that of Alexander.

"Ulpian," remarks Roby, "never names Paul. Paul once only (Dig. 19. 1. 43, see also 45. 2) names Ulpian." They may have been rivals. In the passage referred to, from the undateable *Quaestiones* of Paulus, a *responsum* of Ulpian is canvassed, but not unfavourably. The two Jurists would certainly seem to have been writing *ad Edictum* in almost exactly the same time, possibly unknown to each other.

Of the remaining Jurists in this period the most considerable is [Herennius] Modestinus, a pupil or at least an intimate of Ulpian<sup>205</sup>, and teacher in Law of the younger Maximinus, who was killed, 238 A.D., at the age of 21 or 18<sup>206</sup>. We find an opinion of his, which it would seem had been recently given, confirmed, as that of a Jurist *non contemnendae auctoritatis*, by the Emperor Gordian in 239<sup>207</sup>. In the adjudication on a long dragging suit, about the payment of water-rent, claimed from a firm or club of fullers, 226—244 A.D., we find Modestinus, as at that time a *Praefectus vigilum*, giving his decision against the claim<sup>208</sup>. His works are mainly, if not entirely<sup>209</sup>, written after the death of Caracalla, who is regularly styled *divus* or *divus magnus Antoninus*<sup>210</sup>: but, it is suggested, not very much after, from

<sup>204</sup> Dig. 49. 5. 5. 3: Lenel, Pal. ii. 379, n. 1.

<sup>205</sup> Dig. 47. 2. 52. 20, Herennio Modestino studioso meo de Dalmatia consulenti rescripsi. Modestinus would therefore seem to have been holding some possibly magisterial office in a province before Caracalla's death. The extract is from Ulpian's 37th ad edictum.

<sup>206</sup> Capitolinus, Vita Maxim. duo, 27. 2, 5.

<sup>207</sup> Cod. 3. 42. 5. Ut vivi mentio fit, says Lenel, i. 701, n. 1.

<sup>208</sup> See the *Lis fullonum*, Bruus, i. 362, 3.

<sup>209</sup> Fitting considered that the *Regulae* and part of the *de poenis* might belong to Caracalla's lifetime: Mommsen that the *Excusationes* were composed before 211 A.D.: but see, as to the last, Krüger, 302, n. 2.

<sup>210</sup> E.g. Dig. 50. 12. 12. 1: 50. 4. 11. 3: 27. 1. 14. 2, &c.

there being but one rescript of Alexander mentioned by him<sup>211</sup>. Not too much weight should be given to this suggestion, when we consider the proved juridical activity of Modestinus as late as 244 A.D. Whether as the follower of Ulpian or as the last of the leading Jurists, he enjoyed a very high reputation, being, besides other testimonies, one of the five put in the first rank by the Law of Citations.

Of Florentinus all we know, for certain, as to date is that his 12 Books of *Institutiones* must have been published after the death of Pius, 161 A.D.<sup>212</sup> The passages quoted in the Title referred to (*De acquirendo rerum dominio*), from his 6th Book, look as if it might have been meant as a kind of supplement to Gaius' *Res quotidianae* (see particularly 2, 4, 6, 16, &c.). The work does not, however, follow the order of Gaius' Institutes<sup>213</sup>.

The position of this Jurist in the Florentine Index, between Scaevola and Gaius, is urged by Krüger as proof of his early date<sup>214</sup>. Lenel too makes him the contemporary of Scaevola. I incline to believe him the Florentinus to whom Constitutions of Alexander were addressed in 223 A.D.<sup>215</sup> The objection that in one of these the Florentinus in question is styled *miles* is considered fatal, to identification with a Jurist, by Karlowa<sup>216</sup>. But it is surely not inconceivable that a person, applying to the fountain of justice, might add the fact of a *status* which gave him many legal indulgences, or that a military man might be addicted, even during service, to some study of Law<sup>217</sup>. We may note,

<sup>211</sup> Dig. 48. 10. 29. So Krüger, 302, and Teuffel, ii. § 378. 7, p. 273.

<sup>212</sup> Dig. 41. 1. 16, *divus Pius constituit*.

<sup>213</sup> E.g. the Aquilian stipulation comes in Book 8 (Dig. 46. 4. 18); Testamentum in Book 10 (Dig. 29. 1. 24); Legatum in Book 11 (Dig. 30. 116).

<sup>214</sup> Krüger, 258. 1.

<sup>215</sup> Cod. 3. 28. 8: 6. 30. 2.

<sup>216</sup> Karlowa, i. 751: also Roby, Int. ccv.

<sup>217</sup> If we relied on the improbability of an alleged application to the Emperor, on the ground of the personality of the applicant or the subject-

moreover, that Florentinus obviously<sup>218</sup> held the somewhat special theory of Ulpian as to the opposition, or the subject of slavery, of the *jus naturae* and the *jus gentium*, which seems rather in favour of his later date.

A few less important Jurists are best taken here, though in some instances perhaps a little earlier than at least Paulus and Ulpian.

**Callistratus**, probably a Greek, wrote his *de jure fisci* and *Quaestiones* under Severus<sup>219</sup>. His *de cognitionibus* apparently begins at the end of that Emperor's sole reign, and is continued into the joint reign with Caracalla<sup>220</sup>. His *Institutiones*, for which we have no chronological data, have been held, wrongly according to Krüger<sup>221</sup>, to follow the plan of Gaius.

[A.] **Claudius Tryphoninus**, addressed in full, A.D. 213, by a rescript of Caracalla, generally styled Tryphoninus, but sometimes simply Claudius<sup>222</sup>, was probably a pupil of Scaevola, whose *Digesta* he annotated<sup>223</sup>. He was evidently a colleague with Papinian on some Emperor's Council, most likely that of Severus<sup>224</sup>, but wrote his 21 Books of *Disputationes* in the sole reign of Caracalla<sup>225</sup>, unless we are matter of his prayers, we might surely object to any application at all from a *miles* in the ordinary sense. It is just possible that the word began to mean some official collector of revenue even in Alexander's reign. See *Consultatio*, 9. 16 (Coll. Aj. iii. 220), Imp. Alexander Donato militi; also ib. 9. 19, and Cod. Th. 11. 1. 34: 7. 16.

<sup>218</sup> Compare Dig. 1. 5. 4 with Ulp. Dig. 1. 1. 4.

<sup>219</sup> Imperator noster Severus, Dig. 49. 14. 2. 6: 1. 3. 38, dis. *divus* Pius, Dig. 49. 14. 2. 5, and *divus* Commodus, Dig. 12. 3. 10.

<sup>220</sup> Book 1, Imperator noster Severus, Dig. 50. 4. 14. 4, but principes nostri, Dig. 50. 2. 11. Book 6, Imperatores nostri Severus et Antoninus, Dig. 1. 19. 3. 2.

<sup>221</sup> Krüger, 269. 7. See too Lenel, Pal. i. 97, n. 1.

<sup>222</sup> Cod. 1. 9. 1: Dig. 18. 7. 10: 34. 9. 25. 1.

<sup>223</sup> Dig. 26. 7. 58. 1: 18. 7. 10.

<sup>224</sup> Dig. 49. 14. 50.

<sup>225</sup> Dig. 27. 1. 44 pr., libro secundo dispp. Imperator noster cum divo Severo patre suo.

to take *ab optimis Imperatoribus nostris*, in the 10th Book, as proof that half the work was written in the short joint empire of Caracalla and Geta<sup>226</sup>. The notes above referred to were quoted by Papinian in Book 14 of his *Responsa*, and therefore possibly written in Severus' lifetime<sup>227</sup>.

[Aelius] Marcianus may possibly be identified with the Marcellianus who elicits an important declaration, against *self-help* in recovering one's due, from the Emperor Marcus<sup>228</sup>; scarcely, I think, with the Proconsul of Baetica, under Pius, to whom that Emperor's merciful order about ill-treated slaves is directed<sup>229</sup>. Neither, according to Karlowa, can our Jurist have been the person to whom the rescripts of Alexander in 223 and 228, or that of Gordian in 239 are directed; on account, I presume, of the somewhat elementary character of the questions<sup>230</sup>. If they were worth recording in the Codex, I do not see why a Jurist may not have raised them. As to the date of Marcianus' works, the *de appellationibus* was written certainly after the death of Severus, and all his other books, so far as they can be dated, after that of Caracalla (*divus Antoninus* or *magnus*). In the principal one, the 16 Books of *Institutiones*, he seems to have followed to a certain extent the plan of Gaius, but with considerable additions (belonging rather to Public Law), and with illustrations from poetry and general literature<sup>231</sup>. The fact that but one rescript is cited by Marcianus as *Imperatoris nostri*, i.e. of Elagabalus or Alexander, is taken by Krüger as an indication

<sup>226</sup> Dig. 48. 19. 39. To the above effect Krüger, 269, n. 1, and Karlowa, i. 738. See too Lenel, Pal. ii. 351, n. 1. Clinton, F. R. i. 218, 9 makes this reign Feb. 4, 211, to Feb. 212 A.D.

<sup>227</sup> Dig. 34. 9. 25. 1 (according to ms. F). See Teuffel, ii. § 372, 3, p. 255. Also above, p. 190.

<sup>228</sup> Dig. 4. 2. 13.

<sup>229</sup> Just. 1. 8. 2: Dig. 1. 6. 2. He is Aelius in the above, but Aurelius in Collatio, 3. 3. 1 (Coll. Aj. iii. 147).

<sup>230</sup> Cod. 2. 13. 6: 7. 21. 4: 4. 21. 4. Karlowa, i. 751.

<sup>231</sup> Krüger, 229, 300: Teuffel, ii. § 378, 2, p. 272. See Just. 4. 3. 1, &c.

that he did not long survive Caracalla<sup>232</sup>. The argument is not to my mind conclusive, but may be added to the objection mentioned above, against those rescripts which have been supposed to be addressed to him by Alexander and Gordian.

**Julius Aquila** comes in the Florentine Index after Marcianus. Two passages from his *Responsa*, on taking, in certain cases, the evidence of slaves might naturally be held to have preceded a decree of Severus on the subject. The work is, however, I think, more generally considered to have come later, and its author to be one of the last group of Jurists<sup>233</sup>.

[**Aemilius**] **Macer**, generally simple Macer, who only quotes late authors like Paul and Ulpian, wrote his *Judicia publica* and *de officio Praesidis* certainly after Severus' death; his *de re militari*, also after that of Caracalla<sup>234</sup>. One work, *de appellationibus*, extends to the time of Alexander Severus<sup>235</sup>.

**Licinius Rufinus** is known from a passage in the Quaestiones of Paulus<sup>236</sup> to have consulted that Jurist, probably as a pupil. The *Imperator Antoninus*, whose *Constitutio* he quotes in his *Regulae*, is generally supposed to be Caracalla<sup>237</sup>.

**Furius Anthianus** and **Rutilius Maximus** we have no means of dating, except that they come, in the Florentine Index of Authors, next to Rufinus. All three are placed in

<sup>232</sup> See above, p. 138, for a similar argument in the case of Modestinus. The citation here referred to is Dig. 37. 14. 5. 1.

<sup>233</sup> Dig. 26. 7. 34: 26. 10. 12. For the decree of Severus, Dig. 27. 3. 1. 3, see Karlowa, i. 752. Lenel, Pal. i. 502, calls Aquila a contemporary of Ulpian.

<sup>234</sup> As to the first two, Dig. 29. 2. 61: 47. 10. 40; as to the last, Dig. 49. 16. 13. 6, reading, with Mommsen, *divi Severus et Antoninus*.

<sup>235</sup> Dig. 49. 13. 1 pr., Imperator noster Alexander.

<sup>236</sup> Dig. 40. 13. 4.

<sup>237</sup> Dig. 24. 1. 41. From the subject-matter it might be actually part of the legislation of 206 A.D. See Dig. 24. 1. 32 pr.



the same list, which is roughly chronological, *after* the Jurist next to be mentioned.

**Aurelius Arcadius Charisius**, who held the office of *Magister libellorum*, is generally believed to refer, in a passage dealing with the office of *Praefectus Praetorio*<sup>238</sup>, to a Constitution of Constantine in 331 A.D., which abolished certain rights of appeal<sup>239</sup>. Although this view is accepted both by Karlowa and Teuffel, it is combated with some reason by Krüger, who holds that the abolition of appeal from the *Praefectus* is only mentioned incidentally in the Constitution of 331, and may therefore have been effected before<sup>240</sup>. With this may be taken into account, for what it is worth, the position of Arcadius in the Florentine list, *before* the fairly dateable Licinnius Rufinus. The question has a little additional interest because it also bears on the date of the person who closes the Florentine list.

This is **Hermogenianus**, generally described as the last of the cited Jurists, partly for the reason just stated, partly from his supposed reference to the same Constitution of Constantine, *à propos* of abolition of appeal from the *Praefectus Praetorio*<sup>241</sup>. The latter argument cannot, in my opinion, be considered conclusive. But there are other grounds for putting this person, if a person at all, at the end of the list. No other work of the supposed Hermogenianus is cited in the Digest but the *Epitomae*; for the passage from a supposed *Fideicommissa* of his is now generally attributed to Ulpian<sup>242</sup>. It seems probable that the *Epitomae* are a conspectus of the *jus* or Juristic Law, made about the same time as the *Codex Hermogenianus*, and by the same hand<sup>243</sup>. The date is put by Teuffel about

<sup>238</sup> Dig. 1. 11 pr., 1.

<sup>239</sup> Cod. Th. 11. 30. 16.

<sup>240</sup> Karlowa, i. 754: Teuffel, ii. § 404, 1, p. 327: Krüger, 303, n. 4.

<sup>241</sup> Dig. 4. 4. 17.

<sup>242</sup> Dig. 36. 1. 15. See Krüger, 303, n. 5.

<sup>243</sup> Karlowa, i. 754. It is not an abridgement of the *Codex*, so far as we can judge by the fragments of the latter.

339 A.D.<sup>244</sup> It is immaterial whether Hermogenianus is the author's name or an adjective from a supposed Hermogenes<sup>245</sup>.

<sup>244</sup> Teuffel, ii. § 393, 3, 4, p. 304. Apparently he makes it contemporaneous with the *second* edition of the Codex. The first seems quite as likely, which Mommsen proves to be between 314 and 324.

<sup>245</sup> Karlowa, l.c.: Krüger, 373, n. 1. There is, it may be remarked, an *Aurelius Hermogenes miles*, to whom a rescript of Diocletian and Maximian is addressed in 294. Consultatio, 9. 19 (Collectio Aj. iii. p. 220).

## § 7. CHRONOLOGICAL SKETCH.

The six preceding sections of this book were represented, in the draft of my original design, by the same number of sections on Jurisprudence, which dealt with the definitions and principles of Law *in general* and with the classifications or divisions based upon them. I still contend that this subject can be intelligibly treated in connexion with *one* system of Law—for choice, the Roman—and that it is a valuable introduction to any study of Law which aims at science as distinguished from rule of thumb. The latter contention will probably be admitted by most persons who have had to teach or write on Law as an Honours subject: the former, I have attempted to make good by compressing and simplifying the matter which is to come in the first section of Part II., and by confining both the phraseology and the propositions, so far as I have found it possible, to such as can be illustrated from Roman Law alone.

In the following Chronological Sketch, are set down all the historical facts which I have found, in my own investigations, to have some bearing on the subject of Roman Private Law and its different modes of formation or enactment, in what I believe to be the order of their occurrence. My reasons for entering from time to time upon the difficult Constitutional History of Rome—which I have done with much reluctance and hesitation—are given above (p. 3). It would be affectation to say that my conclusions generally agree with those of Mommsen's great work, the *Staatsrecht*, which has of course been carefully consulted throughout.

Occasional differences of view, as to both the events and their order, may be excused or accounted for, by the fact that my own study was begun by an analysis of the original authorities, independently of any modern work. Such a method might appear to be generally regarded as foolish or arrogant: but it seemed to myself, by way of a change, allowable.

A great deal, I must admit, of the earlier matter here set down, particularly the subjects numbered from 11 to 29, and indeed to 50, is doubtful, in some cases even hypothetical. But, apart from the interest of the enquiry, it was impossible to omit a period in which several of the most important principles of Roman Private Law take their root. What may be termed the making of Rome has also, as was indicated above (p. 3), a great interest in connexion with that part of Jurisprudence which deals with the origin of Law generally.

In considering the original components of the Roman Polity, one cannot but be struck by very close analogies to certain stages of political association reported to us in other early history—in that of Greece, for instance, and, almost more conspicuously, in our own: while the narrative of Israel, from the invasion of Canaan to the reign of Saul, nay even to that of Rehoboam, has often seemed to myself to tally strangely with the successive epochs which I have ventured to identify with the names of Romulus and Numa, the Priest-Kingship, the historical house of Tarquin, the tyranny and its fall.

It was, however, mainly in comparison with Greece and England that the parallels to which I refer were more particularly worked out, in sections 7—10 of my original draft. These sections are at present to be omitted, but I retain the numbering of the subsequent headings, partly because I hope some day to give the omitted sections in full, partly because

the remaining numbers (§§ 11—100) are referred to in a considerable accumulation of varied material which might possibly, as thus indexed, be of use to some other student, should I be unable to finish the present work. Anyhow, the gap being explained, the numbers may serve for the following Chronological Sketch, and be, at the same time, a Table of Contents for the rest of the work, which is already in existence, but in rough form.

**Chronological Sketch.** (N.B. *Italics* are used throughout to indicate what is doubtful in fact or date.)

### A. Prerepublican period.

#### §§ 11—17. Elements of original association.

The monandrous family elsewhere and in Rome.

*Two cognate Latin Tribes.*

*Invasion under two headmen (? Tribuni).*

*Occupation of territory and dispersion.*

*Formation into local Gentes.*

*Union of groups of Gentes into individual Curiae  
(? Houses), mainly for religious purposes.*

*General union (for security) into a Populus (Host),  
with a common fortress Roma (? = the Stream-  
town), a Council of Elders (Senatus) or Fathers  
(Patres), and a general Assembly (Comitium).*

#### §§ 18—23. Gradual developement of Sovereignty.

*Common High Priest or Priests: Pontifices  
(? Atoners or Purifiers), acting also as Judices  
(declarers of Right).*

*Subordinate (and ? occasional) General (Tri-  
bunus).*

*Rex, a Pontifex (with special judicial functions),  
subordinating the military and the other reli-  
gious officers.*

*Systematic assortment of the Gentes to Curiae, with corresponding organisation of Senatus and Comitium.*

*Regal administration of Justice.*

*Ultimate functions of Senatus and Comitium.*

§ 24. Approximations to history.

*Addition of a third Tribe (mainly Etruscan) with consequent new Gentes; also Curiae and Patres of these younger, or later, Gentes.*

*The circle of Gentes closed: dependents or outsiders, though often formed into similar Gentes themselves, are merely the Multitude (Plebs).*

*Final ascendancy of a family belonging to the new third Tribe, and establishment of a Monarchy practically hereditary.*

§§ 25—29. The Tarquinian dynasty, 600—510 B.C.

*A new organisation, including the Plebeians, for purposes of military service and taxation.*

*Grades of such service and taxation, according to Property.*

*The Property recognised, Land and its appurtenances.*

*For purposes of Registration, a Census, with division into Local Tribes.*

*For purposes of Array, a general Muster of the Host, Exercitus.*

*Distribution of the last into Centuries, now meaning hundreds of land.*

*Arrangement of Centuries in Classes (? = callings out, i.e. liabilities to service), according to means of the members.*

*For actual Service, Legio (picking out).*

A new Assembly, by Centuries (Comitium Centuriatum), and its functions.

Formality required for Transfer of Censuable property (Mancipium), and the wide-spreading results of this.

Great public works, aggressive militarism, cruel penalties and general tyranny leading to Revolution.

B.C.

§§ 30—33. Law and administration of Justice under the Kings.

Public Wrongs, religious, quasi-religious, secular.

Private Wrongs, Self-help, Right of Revenge.

Trial of disputed claims by Sacramentum.

#### 509. B. Republic established.

§§ 34—40. Dual Magistracy. Judices, Praetores, Consules.

Administration of Justice:

1. Criminal. Provocatio, &c. (see 449, 339, 286).

2. Civil. Centumviri, delegate Judices, Arbitri. *Judicis postulatio*.

• *Lex Pinaria* (see 349).

Senate. Patres et Conscripti. Auctoritas Patrum. Probouleuma.

Functions of Comitia Centuriata.

§§ 41—50. The Plebeian Tribune and its results.

494. Establishment. First functions negative. Right of uninterrupted meeting (1) by Curiae, (2) by Servian Tribes. Plebeian

B.C.

initiative: Impeachments, Legislative proposals.

Customary Law and alleged early Republican Leges.

The Decemviral Legislation.

- §§ 51—60. 451. The first Ten Tables.
- §§ 61—63. 450. The reaction and the last Two Tables.  
 449. Abolition of Decemvirate and restored Constitution. Tribunate. Comitia Centuriata. *Comitia Tributa*.  
 Lex Valeria Horatia (Provocatio, Plebiscita, see 339 and 286).  
 Henceforth gradual equalisation of the Orders in Secular matters.
- §§ 64—68. 445. Lex Canuleia de connubio patrum et plebis.  
 443. Censorship instituted.  
 434. „ regulated by Lex Aemilia.  
 390. The Gallic conflagration.  
 367. Leges Liciniae. Institution of the Judicial Praetorship. *Lex Plaetoria*.  
 366. Institution of Curule Aedileship with *Comitia Tributa as electing body*.  
 349. *Lex Pinaria* (see above, 509).  
 339. Leges Publiliae (Plebiscita, Auctoritas patrum). See 449 and 286.  
 339. Lex Ovinia. More regular admission of Plebeians to Senate.
- § 69. 326. Lex Poetelia. Abolition of personal Nexus and modification in treatment of Ad-dicti.



B.C.

Legal (instead of merely religious or moral) sanction of Sponsio: correlative Stipulatio (= the Securing).

Consequent introduction of Legis actio per Conditionem.

§ 70. • Résumé of additions of new Tribes and new grades of Citizenship.

§§ 71, 72. 312—304. Reforms of Ap. Claudius Caecus:

1. Constitutional. Redistribution of voters. Enfranchisement of non-landholders.
2. Administrative. Publication of Civil Procedure and "Common Law" generally.

§ 73. 300—286. Lex Ogulnia abolishing Patrician monopoly of Pontificate.  
 Lex Valeria. Final settlement as to limits of Provocatio.  
 Lex Hortensia. Giving force of Lex to Plebiscita.  
*Lex Maenia, diminishing check of Patres on Elections.*  
 New Criminal Magistracy. Tresviri Capiales.  
 • New meaning of Plebs, as opposed to Senate.

§ 74. 286. Lex Aquilia, giving new Civil remedies on Private Wrongs as to Property; also on fraudulent release by Adstipulator, shewing extensive use of Stipulatio already established.

§§ 75, 76. 225. Reforms of Flaminius, and sequel.

B.C.

Comitia Centuriata made Democratic by connexion (for voting) of Centuries and Tribes: hence gradual assimilation, in character, of Leges and Plebiscita.

Compensatory powers acquired by the Senate. Growth of its Executive and ultimately Legislative function.

(Senatus Consultum de Bacanalibus, 186 B.C.)

§ 77.

Developement of Civil Procedure (and consequently of Private Law) by Prudentes. Distinction of Patronus, Advocatus and Prudens.

204. Lex Cincia as to Honoraria.

190. Triperitita of Sextus Aelius.

§§ 78, 79.

**The Jus Gentium of Practice.**

Original standing of Foreigners (Peregrini) in Roman Courts. The Hostis of the Twelve Tables: Reciperatio: commercium.

242. Appointment of second Praetor.

180. Permanent assignment of special Jurisdiction Inter peregrinos or Inter cives et peregrinos.

Hence gradual formation of a Law Merchant, for persons of *any* nationality (Jus Gentium), by specially drawn claims and pleas (Concepta Verba).

§ 80.

178. Lex Aebutia. Recognition of the new system of pleading for Roman Cives, as well as Peregrini: consequent developement of the Formulary System.

- B.C.
- §§ 81—86. The Formulary Procedure in detail.
- §§ 87, 88. The Suffrage and Assemblies from the reform of Flaminius to the end of the Republic.
81. The legislation of Sulla, mainly in its bearing on Private Law.
- § 89. The Praetor's Edict and its growing permanence.
67. Lex Cornelia.
45. First attempt at arrangement of Edict, by Ofilius under Caesar.
- §§ 90, 91. The Jus Gentium of Theory, from Cicero onwards. Consequent shifting meanings of Jus Civile, Aequitas, &c.
- § 92. 30. **C. Establishment of the Empire.**  
Beginning of Imperial Legislation, with temporary survival of Republican forms. Leges, Senatus Consulta, Edicta, Mandata.
- A.D.
- § 93. 131. The Edict of Hadrian (compiled by Julian).
- § 94. Case Law proper at Rome. General acquisition of permanent authority by Imperial Decreta (Rescripta, Epistolae).
- §§ 95, 96. Responsa Prudentium. Their original influence. The effect of those delivered under Imperial License. Gradual acquisition, by the latter, of permanent authority. The rival Schools. Extension.

A.D.

sion of a degree of authority to the works in general of leading Jurists. Resulting confusion and attempts at regulation.

321, 327. Constitutiones of Constantine.

426. Lex Citationum.

§ 97. Attempts at Codification before Justinian.

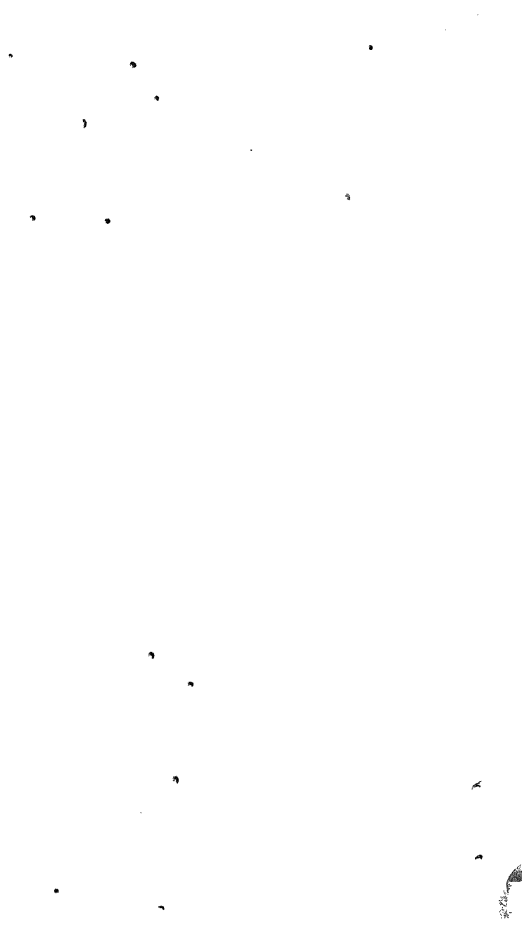
§§ 98—100. 528—534. Justinian's Legislation generally.

Legal study before and under him.

Arrangement of the Digest as to

(1) Order of extracts in a Title;

(2) Order of the Titles themselves.













## JURISTS (3) UNDER TRAJAN, HADRIAN AND THE ANTONINES.

A.D....	Trajan			Hadrian			
	98-104	105-	110-117	117-	120-	125-	130-138
Javolenus.....	fl.	...	d.				
Neratius .....	fl.	...	...	...	...	fl.	
Celsus .....	...	Praetor	...	...	...	Consul	
Minicius .....	...	Consul	Pro- consul				
Pomponius .....	...	...	...	Enchiridium, ad Sabinum		...	...
Julian .....	...	...	...	...	...	...	Edict, Digesta
Africanus .....	...	...	...	...	...	...	...
Aburnius Valens .....	...	...	...	...	...	...	...
Pactumeius Clemens ...	...	...	...	...	...	...	...
Terentius Clemens .....	...	...	...	...	...	...	...
Vindius Varus .....	...	...	...	...	...	...	...
Junius Mauricianus ...	...	...	...	...	...	...	...
Venuleius Saturninus...	...	...	...	...	...	...	...
Maecianus .....	...	...	...	...	...	...	...
Ulpian Marcellus .....	...	...	...	...	...	...	...
Papirius Justus.....	...	...	...	...	...	...	...
Tarruntenus Paternus .	...	...	...	...	...	...	...
Gaius.....	...	...	...	...	...	...	...
Laelius .....	...	...	...	...	...	...	...
Scaevola .....	...	...	...	...	...	...	...

Antoninus Pius					Marcus et Verus (divi fratres)		Marcus	Marcus et Com- modus	Commodus		
138-	140-	145-	150-	155-	161-	165-	169-	176-	180-	185-	190-92

## JURISTS (4) UNDER THE SEVERUS DYNASTY.

	Severus	Severus and Caracalla			Caracalla
A.D....	193-196	196-	200-	205-211	211-217
Scaevola .....	Responsa				
Callistratus .....	De jure fisci, Quaestiones	de cognitionibus			
Papinian .....	Quaestiones	...	Praef. Praet., Responsa		d.
Arrius Menander .....	...		De re militari		
Tertullian .....	...		De castrensi peculio, Quaestiones		
Florentinus .....	<i>fl.</i>	...	...	...	...
Tryphoninus .....	<i>fl.</i>	...	In Scaevolam		Disputationes
Licinius Rufinus.. ...	...	...	...	...	Regulae
Furius Anthianus .....	...	...	...	...	<i>fl.</i>
Arcadius .....	...	...	...	...	<i>fl.</i>
Rutilius Maximus.....	...	...	...	...	<i>fl.</i>
Macer .....	...	...	...	...	Jud. pub., De off. Praes.
Marcianus .....	...	...	...	...	De appellat.
Julius Aquila .....	...	...	...	...	...
Paulus .....	Ad Sabin.		Decreta, &c.		Ad Edictum
Ulpian .....	...		De excusat., &c.		Ad Edictum, Ad Sabinum, De appellat.
Modestinus .....	...	...	...	...	...

Hermogenianus probably belongs to the earlier part of the 4th century.

Elagabalus	Alexander Severus			Maximinus	Gordianus
218-222	222-234	235-	230-235	235-238	238-243
...	<i>fl.</i>				
De re militari, De appellat.					
Institutiones, &c.	...	<i>fl.</i>			
...	...	<i>fl.</i>			
Ad Edictum, De censib., De adult., De jure lib., Responsa					
Ad Edictum, Ad Sabinum, De appellat., De adulteris	...	d.			
...	...	...	...	<i>fl.</i>	<i>fl.</i>



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